as a revision to the Pennsylvania SIP. The regulation requires that the operators of large combustion units, continuously monitor NO_x emissions and report the findings to the Pennsylvania Department of Environmental Resources.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, Part D of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis for would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (S. Ct. 1976); 42 U.S.C. 7410(a)(2).

This SIP revision requiring large combustion units in Pennsylvania to continuously monitor NO_x emissions has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. OMB has agreed to continue that temporary waiver until such time as it rules in EPA's request.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 23, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur Oxides.

Dated: September 8, 1992.

W. Wisniewski,

Acting Regional Administrator, Region III.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

Subpart NN—Pennsylvania

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

PART 52—[AMENDED]

2. Section 52.2020 is amended by adding paragraph (c)(74) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(74) Revisions to the State Implementation Plan submitted by the Pennsylvania Department of Environmental Resources on January 11, 1991.

(1) *Incorporation by reference.* (A) Letter from the Pennsylvania Department of Environmental Resources dated January 11, 1991 submitting a revision to the Pennsylvania State Implementation Plan.

(B) Amendment to 25 Pa. Code Chapter 123.51 "Monitoring Requirements", concerning continuous nitrogen oxides monitoring, effective October 20, 1990.

(ii) *Additional materials.* (A) Remainder of the State Implementation Plan revision request submitted by the Pennsylvania Department of Environmental Resources on January 11, 1991.

[FR Doc. 92-23002 Filed 9-22-92; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 413 and 447

[BPD-311-F]

RIN 0938-AB68

Medicare and Medicaid Programs; Revaluation of Assets

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule revises the Medicare and Medicaid regulations that are affected by section 2314 of the Deficit Reduction Act of 1984 and sections 9110 and 9509 of the Consolidation Omnibus Budget Reconciliation Act of 1985. Those provisions amended sections 1861(v)(1) and 1902(a)(13) of the Social Security Act. This rule describes new limitations on the valuation of assets acquired as the result of changes in ownership occurring on or after July 18, 1984. These changes affect hospitals and skilled nursing facilities under the Medicare program and hospitals, nursing facilities, and intermediate care facilities for the mentally retarded under the Medicaid program.

EFFECTIVE DATE: This final rule is effective on October 23, 1992.

ADDRESSES: If you wish to submit comments on the information collection requirements contained in this final rule, you may submit comments to: Allison Herron Eydt, HCFA Desk Officer, Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Bruce Oliver—Medicare Provisions, (301) 966–4519; Betty Kern—Medicaid Provisions, (301) 966–4580.

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SUPPLEMENTARY INFORMATION

I. Background

A. Deficit Reduction Act of 1984

Section 2314 of the Deficit Reduction Act of 1984 (Pub. L. 98–369), enacted on July 18, 1984, amended sections 1861(v)(1) and 1902(a)(13) of the Social Security Act (the Act) by adding new provisions concerning valuation of assets, that is, determining historical costs applicable to assets of hospitals, skilled nursing facilities (SNFs), intermediate care facilities (ICFs), and intermediate care facilities for the mentally retarded (ICFs/MR) that undergo a change of ownership on or after July 18, 1984. Previously, historical cost had been limited to the lowest of (1) the purchase price, (2) the fair market value, or (3) depreciated reproduction cost.

Section 1861(v)(1) of the Act was amended by the addition of a new paragraph (O), which provides for the following:

- In establishing an appropriate allowance under Medicare for payment of providers for depreciation expense, interest on capital indebtedness, and (if applicable) a return on equity capital, for an asset of a hospital or SNF that undergoes a change of ownership, the value of the asset after the change of ownership is the lesser of the allowable acquisition cost of the asset to the owner of record as of July 18, 1984 (or, in the case of an asset not in existence as of July 18, 1984, the first owner of record after that date), or the acquisition cost of the asset to the new owner.
- Recapture of depreciation in the manner as provided in regulations in effect on June 1, 1984; that is, if disposal of a depreciable asset results in a gain or loss, an adjustment is necessary in the provider's allowable cost. The amount of a gain included in the determination of allowable cost is limited to the amount of depreciation previously included in Medicare allowable costs. The amount of a loss to be included is limited to the undepreciated basis of the asset permitted under Medicare.
- The costs (for example, legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies) attributable to the negotiation and settlement of the sale or purchase of any capital asset (by acquisition or merger) for which payment has previously been made by the Medicare program may not be recognized as reasonable cost in the provision of health care services.

Section 1902(a)(13) of the Act was amended by the addition of a new paragraph (B), which requires that a State must provide assurances satisfactory to the Secretary that the payment methodology utilized by the State for payments to hospitals, SNFs, ICFs, and ICFs/MR can reasonably be expected not to increase these payments, solely as a result of a change of ownership, in excess of the increase that would result from the application of the Medicare requirements of section 1861(v)(1)(O) of the Act.

B. Consolidated Omnibus Budget Reconciliation Act of 1985

Section 9110 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272), enacted on April 7, 1986, amended section 1861(v)(1)(O) of the Act by adding a new provision applicable to changes in ownership of State hospitals to nonprofit corporations without monetary consideration. This new provision requires that, in the case of a transfer of ownership of a State hospital to a nonprofit corporation for which there was no monetary consideration, the basis of the assets to the new owner (the nonprofit corporation) to be used for the purpose of computing capital allowances is the book value of the assets as shown on the State's books at the time of the transfer.

Section 9509 of Public Law 99–272 of the Act also limited (B) to hospitals and added a new paragraph (C) to section 1902(a)(13) of the Act that is applicable to SNFs, ICFs, and ICFs/MR that change ownership on or after October 1, 1985. Prior to the enactment of section 2314 of Public Law 98–369 and section 9509 of Public Law 99–272, the only upper payment limit restriction imposed on States in establishing payment rates was the application of section 1902(a)(30) of the Act. This section required that State plan methods and standards used to determine payment rates result in payments that are consistent with efficiency, economy and quality, of care. Historically, through regulations, we interpreted this requirement to mean that a State's aggregate payment amounts cannot exceed payment amounts calculated based on Medicare payment principles. The new paragraph (C) of section 1902(a)(13) of the Act requires a State to provide assurances satisfactory to the Secretary that the valuation of capital assets for purposes of determining payment rates for SNFs, ICFs, and ICFs/MR will not be increased beyond certain levels. The valuation of the asset may not increase (as measured from the date of acquisition by the seller to the date of the change of ownership), solely as a result of a change of ownership, by more than the lesser of—

- One-half of the percentage increase (as measured over the same period of time specified above, or if necessary, as extrapolated retrospectively by the Secretary) in the Dodge construction index applied in the aggregate with respect to those facilities that have undergone a change of ownership during the Federal fiscal year; or
- One-half of the percentage increase (as measured using the same period of time stated above) in the Consumer Price Index for All Urban Consumers (United States city average).

Congress intended for section 1902(a)(13)(C) of the Act to impose a statutory ceiling on the revaluation of assets as the result of a change in ownership. This section does not set any specific payment level for capital costs. States are free to continue to apply payment rates and standards that are consistent with the more stringent payment ceiling imposed on hospitals by section 1902(a)(13)(B) of the Act. States may also require the recapture of depreciation, as is authorized by the reference to section 1861(v)(1)(O) of the Act in section 1902(a)(13)(B) of the Act, in order to assure that the Medicaid program pays for an asset only once.

Section 9509 of Public Law 99–272 further provides that if a change to the existing State plan methodology is necessary in order for the plan to meet the requirements of section 1902(a)(13)(C) of the Act, and this methodology change cannot be effectuated without a State legislative change, the State agency will not be regarded as failing to comply with the requirements of section 1902(a)(13)(C) solely on the basis of its failure to meet these section 1902(a)(13)(C) requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after April 7, 1986.

Both Public Law 98–369 and Public Law 99–272 impose specific effective dates that are set forth in section V.A of this preamble.

C. Omnibus Budget Reconciliation Act of 1987

Section 4211(h) (2)(C) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203), enacted on December 22, 1987, amended section 1902(a)(13)(C) of the Act to reflect the elimination of

separate criteria for certifying SNFs and ICFs under Medicaid effective October 1, 1990. The Medicaid statute now recognizes one type of facility that provides long term care: nursing facilities (NFs). Consequently, States are required to provide needed assurances for NFs and ICFs/MR. We are revising the regulations to reflect this change in terminology.

II. Provisions in the Proposed Rule

On October 26, 1987, we published a proposed rule (52 FR 39927) that described new limitations on the valuation of assets acquired as the result of changes in ownership occurring on or after July 18, 1984. In the preamble of that proposed rule, we described our policies concerning allowable costs and patient-care-related capital costs prior to the enactment of Public Law 98–369 and Public Law 99–272, and proposed the following changes to the regulations that would implement the new provisions.

A. Medicare

1. Changes Resulting From Section 2314 of Public Law 98–369

a. *Sale and leaseback arrangements.* In § 413.130(b), which governs the inclusion of lease and rental costs in a provider's capital-related costs, we proposed, for sale and leaseback arrangements entered into by hospitals and SNFs on or after the effective date of this final rule, limiting the amount providers may include as patient-care-related capital costs for rental or lease expense to the amount a provider would have included in patient-care-related capital costs had the provider retained legal title to the asset. This proposed change was not explicitly required by law. However, based on the language of the conference report (H.R. Rep. No. 861, 98th Cong., 2nd Sess. 1339 (1984)), we believe that Congress recognized that this proposed change was needed to prevent circumvention of the revaluation of asset limitation imposed by section 1861(v)(1)(O).

In addition, we proposed new §§ 413.134(h) (1) through (3) that would govern the amount of lease or rental expense that providers may include in allowable costs under sale and leaseback transactions. Proposed §§ 413.134(h) (1) and (2) set forth our long-standing policy, currently in section 110.A of the Provider Reimbursement Manual, and applicable to all providers, governing the amount a provider may include in allowable costs under sale and leaseback agreements. Proposed § 415.134(h)(3), which is consistent with new § 413.130(b)(4), would apply to hospitals and SNFs only and would limit the amount of lease or rental expense that a hospital or SNF may include in allowable costs under a sale and leaseback transaction entered into on or after the effective date of this final rule to the amount the hospital or SNF would have included in allowable costs had the hospital or SNF retained legal title to the asset.

b. *Revaluation of a capital asset.* Congress enacted section 1861(v)(1)(O) of the Act to ensure that the Medicare program does not pay for the same capital asset more than once. This provision is intended to limit the revaluation of an asset for purposes of determining depreciation, interest expense of capital indebtedness, and (if applicable) return on equity capital to the allowable acquisition cost to the individual or entity who was the owner for Medicare purposes on July 18, 1984. The purchasing entity's valuation is the lesser of its own acquisition cost or the allowable acquisition cost of the previous owner (not reduced by accumulated depreciation). We proposed to amend § 413.134 to conform the regulations to the limitation on revaluation of assets set forth under section 1861(v)(1)(O) of the Act, as follows:

- We proposed revising § 413.134(b), which describes historical cost, by adding a new paragraph (b)(1)(ii) to implement the statutory limitation applicable to hospitals and SNFs for assets acquired on or after July 18, 1984 and not subject to an enforceable agreement entered into before that date.
- In a new § 413.134(b)(1)(ii)(B), we proposed that the term "asset not in existence as of July 18, 1984" include any asset that physically existed, but was not owned by a provider participating in the Medicare program as of July 18, 1984.
- For purposes of calculating the historical cost limitation, we proposed a new § 413.134(b)(1)(ii)(C) providing that the acquisition cost to the owner of record (the previous owner) on July 18, 1984 would be subject to any limitation on historical costs imposed by Medicare prior to that time, and that this cost would not be reduced by any depreciation taken by that owner of record. We also explained that the purchase of land, which is neither depreciable nor amortizable under any circumstances, would be subject to the historical cost limitation for the purpose of determining allowable interest expense for both proprietary and nonproprietary providers, and (if applicable) return on equity capital for proprietary providers only.
- In a new § 413.134(b)(1)(ii)(D), we proposed that, for application of the limitation, the cost to the owner of record would include the costs of betterments and improvements that extend the useful life of the asset at least two years beyond its original estimated useful life, or increases the productivity of an asset significantly over its original productivity.
- We proposed a new § 413.134(b)(1)(ii)(E), which provided that, for assets acquired prior to a provider's entrance into the Medicare program, the acquisition cost to the owner of record is the historical cost of the asset when acquired, rather than when the provider entered the program.
- In a new § 413.134(b)(1)(ii)(F), we proposed to further explain the determination of the acquisition cost to the owner of record for assets subject to the optional depreciation allowance described in § 413.139.
- In a new § 413.134(b)(1)(ii)(G), we proposed excluding from historical cost the costs attributable to the negotiation or settlement of the sale or purchase (by acquisition, merger, or consolidation) of any capital asset for which any payment was previously made by the Medicare program.
- Because the limitation set forth in § 413.134(b)(1)(ii) applies only to hospitals and SNFs, in a new § 413.134(b)(1)(iii), we proposed that if a change of ownership occurs that involves assets of a hospital-based provider other than a SNF or a SNF-based provider (to which section 1861(v)(1)(O) of the Act does not apply), a reasonable allocation of the purchase price must be made so that the non-hospital or non-SNF provider would not be affected by the limitation imposed by section 1861(v)(1)(O) of the Act, but rather would be subject to the limitations imposed prior to the implementation of that section that continue to control changes of ownership involving nonhospital and non-SNF providers.
- Finally, we proposed adding a new paragraph to § 413.134(g), which governs the establishment of the cost basis for assets obtained in the purchase of a facility as an ongoing operation, to limit the historical cost of assets of hospitals and SNFs acquired on or after July 18, 1984 and not subject to an enforceable agreement entered into before that date. Under proposed § 413.134(g)(3), the limit would be the lower of the allowable acquisition cost of the asset to the owner of record as of July 18, 1984, or the acquisition cost to the new owner.

2. Changes Resulting from Section 9100 of Public Law 99–272

Section 9110 of Public Law 99–272, enacted section 1861(v)(1)(O)(iv) of the Act to provide a special rule for valuing assets for Medicare purposes for State hospitals that are transferred without monetary consideration to nonprofit corporations. We proposed the following changes to implement this section:

- We proposed to add § 413.134(b)(8) that provides a rule for donated asset consistent with the discussion in section 104.15 of the Provider Reimbursement Manual. We also proposed clarifying in § 413.134(b)(8) that, if an asset is exchanged for new debt or the assumption of debt, then the transaction is considered a sale and not a donation.
- We proposed to consolidate, in § 413.134(j), the regulations governing donations to providers. This included a special rule to implement section 1861(v)(1)(O)(iv) of the Act, which governs the transfer of a State hospital to a nonprofit corporation without monetary consideration. This special rule provides that, in the case of a transfer of ownership of a State hospital to a nonprofit corporation for which there was no monetary consideration, the new owner's depreciable basis is the net book value of the assets as recorded on the State's books at the time of the transfer.

3. Other Changes

In §§ 413.130(b) (8) and (9), we proposed changes that would be applicable to lease purchase transactions entered into on or after the effective date of this final rule. Specifically, we proposed new criteria that would redefine lease purchase transactions. These criteria are the same as the criteria used to identify capital lease transactions under generally accepted accounting principles (GAAP) and, for that purpose, are also set forth in the Statement of Financial Accounting Standards Number 13, "Accounting for Leases," (SFAS 13) issued by the Financial Accounting Standards Board. In addition, we proposed that, for lease purchase transactions in which the lessee becomes the owner of the leased asset and subsequently disposes of the asset, the total amount considered as depreciation for the purpose of computing the limitation on allowable lease or rental costs (as required by new paragraph (b)(9)(i) of § 413.130) must be included in calculating the limitation on adjustments to depreciation for the purpose of determining any gain or loss realized upon disposal of the asset. We stated that the purpose of this latter provision was to prevent providers that obtained assets through lease purchase transactions and subsequently disposed of these assets from having an unfair advantage over providers that bought assets outright and subsequently disposed of them.

We proposed clarifying in § 413.134(f)(1) that the gain or loss on the disposition of depreciable assets has no retroactive effect on a proprietary provider's equity capital for years prior to the disposition.

We also proposed clarifying § 413.134(f)(4) to include donations in the category of asset dispositions for which gains or losses are not included in allowable costs.

We proposed new sections 413.134(h) (4) through (7) that would govern the amount a provider may include in allowable costs under lease purchase transactions. Proposed §§ 413.134(h) (4) and (5) set forth our long-standing policy, currently in section 110.B of the Provider Reimbursement Manual, governing the amount of lease or rental expense a provider may include in allowable costs under a lease purchase transaction. In addition, in new §§ 413.134(h) (6) and (7), we proposed changes applicable to lease purchase transactions entered into on or after the effective date of this final rule. These changes include new criteria to redefine lease purchase transactions and describe a special rule with respect to the determination of the gain or loss adjustment upon disposition of an asset acquired through a lease purchase transaction and are consistent with the changes for lease purchase transactions described for § 413.130(b), above.

We explained that we were considering applying the limitations on asset valuations under section 2314 of Pub. L. 98–369 to all providers under both Medicare and Medicaid programs, and we requested public comments on that proposal.

We also discussed the application of "fair market value" as an additional limitation on the valuation of an asset acquired on or after July 18, 1984. In that discussion, we pointed out that although the language of section 1861(v)(1)(O) of the Act does not explicitly include the fair market value of an asset in the historical cost limitation, it would be contrary to general reasonable cost principles in section 1861(v)(1)(A) of the Act for Medicare to recognize more than the fair market value of an asset. Therefore, we explained that in those instances in which the fair market value of an asset is less than both the allowable acquisition cost of the asset to the owner of record as of July 18, 1984 and the acquisition cost of the asset to the new owner, we would apply the regulations contained in §§ 413.134(g)(4) and 413.9 to limit the historical cost of the asset to the new owner to the fair market value for purposes of establishing an appropriate allowance under Medicare for depreciation, interest on capital indebtedness, and (if applicable) a return on equity capital.

B. Medicaid Changes Resulting From Sections 1902(a)(13) (B) and (C) of the Act

As described in section I.B above, sections 1902(a)(13) (B) and (C) of the Act limit State Medicaid payment for the patient-care-related capital costs associated with the sale or transfer of hospitals or nursing facilities. We proposed the following amendments to 42 CFR part 447, subpart C, which governs payment for inpatient hospital and long-term care facility services.

- We proposed amending § 447.250, which describes the basis and purpose of subpart C, by adding a new paragraph (c) that explains that §§ 447.253 (c) and (d) implement sections 1902(a)(13)(B) and 1902(a)(13)(C) of the Act.
- We proposed amending § 447.253, which describes other requirements concerning State assurances, to include the assurances required by sections 1902(a)(13)(B) and 1902(a)(13)(C) of the Act for changes in ownership. Congress intended that the assurances apply to increases that are solely a result of a change in ownership. We proposed that the assurance for each level of care (that is, hospital, SNF, ICF, and ICF/MR) be based on the increase in payments to all facilities within that class of facilities that have a change in ownership during a specified period.

With respect to section 1902(a)(13)(C) of the Act, section 9509 of Public Law 99–272 specifically states that the amendments mandated by this section shall apply to medical assistance furnished on or after October 1, 1985, but only with respect to changes of ownership occurring on or after such date that were not subject to an enforceable agreement entered into prior to October 1, 1985.

III. Discussion of Public Comments

In response to the October 26, 1987 proposed rule, we received 12 timely items of correspondence. The comments were submitted by three health care associations, four providers, a provider chain organization, a fiscal intermediary, an appraisal firm, and two State agencies. The specific comments

made by the commenters and our responses follow.

A. General

Comment: Two commenters suggested that failure to recognize fair market value of assets when change of ownership occurs is contrary to the movement of the Medicare program to a market-driven system. The commenters asserted that if Medicare does not recognize fair market costs, increased costs must be borne by non-Medicare patients. The commenters stated that section 1861(v)(1)(O) of the Act and the proposed regulations act as a disincentive for the health care delivery system to consolidate and to recognize the economies of scale as a means of spreading the risk inherent in a market-driven system. They asserted that this section of the Act should be repealed and the proposed regulations should not become effective.

Response: Since the enactment of section 2314 of Public Law 98–369, no evidence has been brought to our attention that would indicate that the new limitation on revaluation of assets has had a significant impact on provider decisions regarding mergers and acquisitions. We believe this is due to the weight of factors like tax incentives, increased buying power and increased market entry which, we believe, have offset any perceived disincentives caused by this provision. Moreover, we believe the rule, as proposed, fairly reflects the intent of Congress that the Medicare program should pay for the use of an asset only once. In effect, Congress has redefined Medicare's share of allowable costs to exclude excess costs that result solely from changes in ownership of assets. In any event, there are statutory provisions that we must implement and that only Congress can revise or repeal.

Comment: One commenter is concerned that the provisions of section 2314 of Public Law 98–369, combined with the capital reduction provisions of section 9303 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509) and section 4006 of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203) (which both reduce by specified percentages the amount payable for capital-related costs of most hospitals paid under the prospective payment system), represent a fragmented approach that will result in significant shortfalls in capital payment and lead to increased deficiencies in patient care. The commenter asserted that this approach will result in more providers being cited for building deficiencies. The commenter recommended that we implement the capital reduction factors expressed in Public Law 99–509, but not those expressed in Public Law 100–203. In addition, the commenter recommended that we do not implement section 2314 of Public Law 98–369. Rather, the commenter recommended that we use a local construction index as a limitation on asset revaluations. In other words, if an asset changed ownership after July 18, 1984, the new owner's basis would be limited to the lesser of the undepreciated historical costs as of July 18, 1984, inflated to the date of the change of ownership by a local construction index, or the acquisition cost to the new owner. The effect of this recommendation would be to permit limited upward revaluations of assets when the assets undergo a change of ownership.

Response: Congress has permitted no leeway in implementation of these very specific provisions from section 2314 of Public Law 98–369, section 9303 of Public Law 99–509, and section 4006 of Public Law 100–203. Since receipt of this comment, Congress has extended the capital-related cost reduction factor by enactment of section 6002 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239) and section 4001(a) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508). However, there is no evidence in the legislative history of these provisions that would suggest that Congress intended these capital-related cost reduction facors to supersede the limitation on asset revaluations expressed in section 2314 of Public Law 98–369.

Although the asset revaluation provisions and capital reduction provisions both have as their purpose the promotion of economies in the Medicare program, they affect the determination of reasonable costs in different ways. For example, section 2314 of Public Law 98–369 applies to both hospitals and SNFs and serves to limit the valuation of assets that undergo a change in ownership. On the other hand, the capital-related cost reduction provisions of Public Law 99–509 and Public Law 100–203 apply only to the inpatient capital-related costs of hospitals paid under the prospective payment system and do not affect payment for the capital-related costs of SNFs. With such distinct differences in the application and intended effect of these provisions, we have no reason to believe that the capital-related cost reduction factors were intended to replace the revaluation of assets limitation.

Comment: Three commenters urged that the final rule not be applied to all types of providers. They argued that to do otherwise would go beyond Congressional intent and would be contrary to a market-driven system. Further, they argued, it would hinder provider flexibility in financing and structuring services. However, one commenter, an intermediary, believes that the intent of Congress to pay for an asset only once can be accomplished only if the limitation is extended to all types of providers. The commenter stated that not to do so would place additional administrative and audit burdens on fiscal intermediaries to properly account for different limitations for each type of provider.

Response: We agree that extending this rule to all types of providers would make administration of the Medicare program easier. Moreover, extending the rule to cover all types of providers would increase the economies that Congress envisioned would result from this legislation. However, we are not taking such action at this time. Rather, we will continue to consider whether we should extend this rule to cover all types of providers and, if so, whether such an extension should be made through a further revision to the regulations or through further legislation.

B. Sale and Leaseback Arrangements and Lease Purchase Transactions—Effective Dates

Comment: Two commenters asked us to verify that the proposed changes to lease arrangements would be applied prospectively, and would be applied only to binding agreements entered into on or after 30 days following publication of the final rule. One of these commenters requested that the final rule clarify the prospective nature of the provisions regarding calculation of a gain or loss upon position of an asset that was acquired through a virtual purchase.

Response: As stated in the proposed rule (at 52 FR 39932), these changes take effect 30 days after publication of this final rule. Therefore, they apply only to binding agreements entered into on or after October 23, 1992. With respect to sale and leaseback agreements and lease purchase transactions entered into prior to the effective dates of these changes, the regulations at § 413.130(b)(2) through (5) and sections 110.A and B of the Provider Reimbursement Manual apply.

C. Sale and Leaseback Arrangements

Comment: Two commenters expressed their belief that our rules

regarding sale and leaseback arrangements that were in effect prior to this final rule provided adequate safeguards against the payment of unreasonable costs. Those rules, set forth in § 413.130(b) (2) and (3) and in section 110.A of the Provider Reimbursement Manual (HCFA Pub. 15–1), permitted a provider to include the full amount of the lease payments incurred under a sale and leaseback arrangement in its allowable costs if (1) the lease payments were reasonable, (2) adequate, alternate facilities were not available at a lower cost and (3) the leasing was based on economic and technical considerations. If these three criteria were not met, the provider would not be permitted to include the full amount of the lease payments in allowable costs. Rather, the allowable lease payments would be limited to the amount the provider could have included in allowable cost had it retained ownership of the assets (the "costs of ownership"). Further, if the provider and the lessor were considered related organizations under § 413.17, the lease payments would not be permitted at all, and instead the provider could include in allowable costs only the costs of ownership. The commenters stated that our proposed rule inappropriately treats all sale and leaseback transactions entered into by hospitals or SNFs as related organization transactions in that it would limit the costs that a provider may include in allowable costs to the costs that were incurred prior to the sale and leaseback (i.e., the costs of ownership). They believe our proposed treatment of sale and leaseback arrangements exceeds Congressional intent by applying the same restrictive regulatory provisions to both transactions involving related organizations and transactions involving organizations that are not related. The commenters believe that our proposal could have a serious and irreversible impact on many contemporary, cost-effective capital financing programs. As an alternative to our proposed rule, one of the commenters suggests that we not apply the proposed rule to transactions involving organizations that are unrelated, including arrangements with capital syndications and real estate investment trusts.

Response: We do not agree. In the conference report that accompanied Public Law 98–369, Congress expressed concern that the limitation on revaluation of assets could be circumvented by certain sale and leaseback arrangements and directed the Secretary to take into account the limitation on the revaluation of assets in determining the reasonableness of lease or rental costs. Specifically, the conference report states:

> The conferees recognize that the limitation on the revaluation of assets acquired by hospital or nursing homes could be circumvented by certain sale/lease-back or sale-rental agreements. The conferees expect that the Secretary will determine the reasonableness of any lease or rental costs involving a depreciable asset which has undergone a change in ownership taking into account the limitation on the revaluation of assets. (H.R. Rep. No. 861, 98th Cong., 2nd Sess. 1339 (1984).)

Moreover, the same conference report explains that the purpose of the revaluation of assets limitation is to prevent Medicare from paying for the same capital asset more than once. In a sale and leaseback arrangement, the asset is sold by the provider and then leased back, often, if not always, at an amount that exceeds the costs of ownership that the provider incurred prior to the sale. If Medicare recognized the full lease amount over the remaining life of the asset, Medicare would be paying more for the same asset solely as a result of the sale and leaseback transaction, contrary to the expressed intent of Congress. By limiting the amount that a hospital or SNF may include in allowable costs after a sale and leaseback to the same amount that was included in allowable costs before the transaction, we are ensuring that Medicare pays for the asset only once. Thus, we believe that the proposed rules do not exceed Congressional intent. Due to the prospective effective date of the rules governing sale and leaseback arrangements, we do not agree that the rules will negatively impact contemporary capital financing arrangements. Rather, by applying the rules prospectively, hospitals and SNFs will have the opportunity to consider the impact of the rules before entering into capital financing arrangements, including capital syndications and real estate investment trusts, that involve sale and leaseback arrangements.

Comment: One commenter believes that in a sale and leaseback situation, if the lessor sells the asset at the end of the lease period, the resultant gain or loss should be used to adjust the aggregate amount that a provider claimed as rental or lease expense over the life of the lease. Proposed §§ 413.130(b)(4) and 413.134(h)(3) provide that the amount a provider may include in its capital-related costs and allowable costs as rental or lease expense may not exceed the amount that the provider would have included in its capital-related costs and allowable costs had the provider retained legal title to the facilities or equipment. The commenter believes that if this adjustment is not made, Medicare payment could be more or less than the provider's original acquisition cost.

Response: We agree with the commenter that absent such an adjustment Medicare payment could be more or less than the provider's original acquisition cost. However, we do not believe that we have the authority to make the recommended adjustment unless the provider and the lessor are related organizations under the provisions of § 413.17. In a sale and leaseback arrangement, when the asset is sold by the provider to the entity that then becomes the lessor, an adjustment is made to the provider's allowable cost for any gain or loss incurred on the sale, in accordance with § 413.134(f), because the provider, having received the proceeds from the sale, incurs the gain or loss. However, if the lessor ultimately sells the asset at the end of the lease period, the lessor receives the proceeds from that subsequent sale, and thus incurs the gain or loss. Because the lessor incurs the gain or loss, rather than the provider, we believe that we should not adjust the provider's allowable costs for this gain or loss, unless, as stated above, the parties are related organizations.

Comment: One commenter stated that the rule should include a "carry forward" provision to provide for situations in which the rent paid in the early years of the lease is greater than the amount of rent allowed as a capital cost under the annual limitation. The commenter suggested the excess rent paid in the early years should be "carried forward" and allowed in any year in which lease cost is less than annual limitation.

Response: We agree with the commenter. Therefore, in this final rule, we explicitly provide that if, in the early years of the lease, the annual rental or lease costs exceed the annual costs of ownership, but in the later years of the lease, the annual rental or lease costs are less than the annual costs of ownership, the provider may carry forward amounts of rental or lease costs that were not included in capital-related costs or allowable costs in the early years of the lease due to the costs of ownership limitation, and include these amounts in capital-related costs or allowable costs in the years of the lease when the annual rental or lease costs are less than the annual costs of ownership. This new language is in §§ 413.130(b)(4)(ii) and 413.134(h)(3)(ii).

Comment: One commenter suggested that the final rule specify that the useful

life of an asset cannot be changed after the sale and leaseback transaction. Otherwise, he suggested, providers could circumvent the annual limitation by shortening the estimated useful life of the asset.

Response: A provider cannot change an asset's useful life after it has been sold because the provider no longer owns it.

D. Lease-purchase Transactions

Comment: Two commenters asserted that HCFA has used the term "program initiative" to expand the definition of when a lease is considered a lease purchase transaction, implying that the proposed revised definition did not come directly from section 2314 of Public Law 98–369. One of these commenters recommended that the costs of ownership under a virtual purchase should be allowed consistent with the costs allowed under a purchase of assets. The other commenter recommended that the final rule clarify the purpose of this new definition, its application, and its potential effects.

Response: The commenters are correct that the revised definition of a lease purchase transaction did not come from section 2314 of Public Law 98–369. Rather, the new definition is based on the criteria used to identify capital lease transactions under generally accepted accounting principles (GAAP), as reflected in the Statement of Financial Accounting Standards Number 13, "Accounting for Leases," (SFAS 13) issued by the Financial Accounting Standards Board. In the proposed rule (52 FR 39932), we inadvertently stated that the change is intended to prevent possible circumvention of the revaluation of assets limitation required by sections 1861(v)(1) and 1902(a)(13) of the Act. We should have characterized the change as a "program initiative" intended to provide a more objective standard for defining a lease purchase transaction and to end the disputes that have arisen under the current definition concerning whether particular lease arrangement constitute lease purchase transactions.

For reasons of consistency with generally accepted accounting principles, providers have urged us to adopt in its entirety the Statement of Financial Accounting Standards Number 13 (SFAS 13) for purposes of accounting for leases under Medicare. We continue to believe that we should not fully adopt SFAS 13 for Medicare payment purposes because SFAS 13 permits methods of accounting for leased assets that are not recognized by Medicare for owned assets. For example, SFAS 13 accounts for capital leases as if the asset were owned and, in so doing, permits the use of accelerated methods of depreciation. Medicare has prohibited the use of most accelerated methods of depreciation for owned assets since August 1, 1970. Therefore, if Medicare were to fully adopt SFAS 13, providers would use accelerated methods of depreciation on certain leased assets that they could not use if the asset were owned outright. We believe that this would create an inappropriate incentive toward leasing. Although we have not fully adopted SFAS 13, we have adopted the same criteria for identifying a lease purchase transaction as SFAS 13 uses for identifying a capital lease. Due to the objective nature of these criteria, their adoption should greatly reduce the number of disputes that have arisen in the past over whether particular leases are lease purchase transactions. This change should also reduce the administrative burden of both providers and fiscal intermediaries because a lease will have to be compared with only one set of criteria to determine whether it is a capital lease under GAAP and whether it is a lease purchase arrangement under Medicare. We will continue to treat the costs incurred under a lease purchase in the same manner as before this change, subject to the limitation on revaluations of assets. That is, we will limit the lease or rent expense to the costs that would have been incurred had the provider purchased the asset outright (that is, the costs of ownership).

Any excess of lease or rental payment over the costs of ownership will be deferred until either of two events occurs: (1) The leased asset is returned to the lessor, in which case the entire deferred amount will be allowed in the year the asset is returned; or (2) the provider obtains legal title to the asset, in which case the deferred amount becomes part of the historical cost of the asset, subject to the limitation on revaluations of assets, and is depreciated over the remaining useful life of the asset. Because we have no data on the number of leases that are considered capital leases for purposes of GAAP, but are currently not considered lease purchase transactions for Medicare purposes, we are unable to predict the impact of this change in the definition of lease purchase transactions.

Comment: One commenter is concerned that the rule computes the present value of the minimum lease payments using the lower of the lessee's incremental borrowing rate or the "lessor's implicit rate." The commenter suggests that the term "lessor's implicit rate" should be replaced with the term "interest rate implicit in the lease" to be consistent with generally accepted accounting principles.

Response: We agree with the commenter. Therefore, we have revised §§ 413.130(b)(8)(iv) and 413.134(h)(6)(iv) accordingly.

Comment: One commenter stated that when a lessee becomes the owner of a leased asset and subsequently sells the asset, requiring imputed depreciation to be included in the gain or loss computation conflicts with generally accepted accounting principles. The commenter recommends adopting SFAS 13 for administrative simplicity.

Response: We do not agree with the commenter. We have already explained our reason for not fully adopting SFAS 13. However, as indicated above, we have adopted SFAS 13 in part, and this partial adoption should make administration of the Medicare program easier.

E. Historical cost

Comment: One commenter is concerned that although the preamble to the proposed rule states that the historical cost will be limited to the fair market value if that value is less than the limitation in § 413.134(b)(1)(ii)(A), the regulations text does not seem to use fair market value as a limit for historical cost. The commenter recommends that, rather than relying exclusively on the general rule defining reasonable cost (§ 413.9(b)(1)) to establish a fair market value limitation, we include an explicit fair market valuation in § 413.134(b)(1)(ii)(A).

Response: Although Congress did not explicitly include a fair market value limitation in section 1861(v)(1)(O) of the Act, we do not believe that Congress intends that the Medicare program pay more than fair market value for an asset. For Medicare to recognize more than the fair market value would be inconsistent with section 1861(v)(1)(A) of the Act, since payments would exceed the cost actually incurred. Therefore, we proposed to apply the regulations at §§ 413.134(g)(4) and 413.9(b)(1), which have as their basis section 1861(v)(1)(A) of the Act, to impose a fair market value limitation in a situation in which the fair market value of the asset is less than the limitation in § 413.134(b)(1)(ii)(A). However, we agree with the commenter that including an explicit fair market value limitation in the regulations is preferable. Thus, we have revised §§ 413.134(b)(1)(ii)(A) and 413.134(g)(3) in this final rule to add the fair market value limitation.

Comment: One commenter is concerned that the proposed rule did not

include the assets of the home office of a nursing facility or hospital. The commenter suggests revising the rule to clarify that it applies to all assets, whether recorded on the books of the provider or the home office. Also, the commenter recommends revising the rule to make clear that the sale or purchase of individual assets is not covered by the proposed rule.

Response: The related organization rules at § 413.17 impose the same general limitations on related organization costs, including those costs of home offices of nursing facilities or hospitals, as are imposed on provider costs. Thus, the provisions of this final rule apply to assets of home offices of hospitals and nursing facilities, as well as other organizations related to hospitals and nursing facilities. Also, we believe that Congress clearly intended that the limitation apply not only to the sale or purchase of groups of assets, but also to the sale or purchase of individual assets.

F. Application to Hospitals or Nursing Facilities for Which Program Payments Have Been Suspended Under § 405.370

Comment: One commenter is concerned that the proposed rule inappropriately limits application of the law to exclude assets of a hospital or nursing facility for which program payments have been suspended under § 405.370. Specifically, the commenter believes that the language in proposed § 413.134(b)(1)(ii)(B), by including in the concept of "an asset not in existence" any asset that physically existed but was not owned by a hospital or nursing facility participating in the Medicare program, would preclude application of the law to assets of hospitals and nursing facilities for which program payment has been suspended under § 405.370.

Response: A hospital or nursing facility for which program payments have been suspended under § 405.370 is, nevertheless, participating in the Medicare program. Therefore, the language in proposed § 413.134(b)(1)(ii)(B) would not exclude the assets of these providers from application of the law.

G. Costs of Land

Comment: One commenter suggested that costs incurred for land be recognized as capital-related costs, and stated that there are a number of decisions by U.S. Courts of Appeals that have determined that there are allowable capital costs related to land. The commenter suggests that to deny that there are capital costs related to land, including land use costs, goes beyond the Congressional intent of sections 1861(v)(1) and 1902(a)(13) of the Act.

Response: The Medicare program has never allowed depreciation expense on land. This is consistent with Generally Accepted Accounting Principles that recognize land as a permanent asset, not subject to physical wear and tear. Although a few courts have allowed amortization of land use costs in cases where the provider's ownership was for a fixed period of time (for example, *Villa View Community Hospital* v. *Heckler*, 720 F.2d 1086 (9th Cir. 1983)), we think those cases are limited to their particular facts. Medicare does recognize certain capital costs related to land. We recognize land rental (or lease) costs, interest expense on the purchase of land, and for those providers entitled to a return on equity capital, we include the cost of land in the return on equity computation. However, we find nothing in the Congressional language of section 1861(v)(1) or 1902(a)(13) of the Act to suggest that Medicare should begin recognizing the depreciation or amortization of land costs.

Comment: One commenter stated that it is inappropriate to deny payment to a hospital for interest expense on debt used to purchase land that is priced at fair market value but is considered excessive based on the historical cost limitation. The commenter argues that because hospitals cannot avoid these costs, some of the financial burden will be shifted to other payors.

Response: We believe that the clear language of section 1861(v)(1)(O)(i) of the Act, "In establishing an appropriate allowance for * * * interest * * * with respect to an asset * * *" leaves us no discretion on this question. Land, although not a depreciable asset, is an asset of a hospital or an SNF. The statute does not limit the application of this provision to "depreciable" assets. Moreover, the prohibition against cost shifting is part of the definition of reasonable costs in section 1861(v)(1)(A) of the Act. Costs in excess of the limitation are unreasonable costs, and, as such, are not subject to the prohibition against cost shifting.

Comment: One commenter stated that the proposed rule is not clear as to whether leasing costs incurred on land would be considered payable. The commenter urged that the rule be clarified to state that the cost of leasing land from an unrelated party would be paid under a straight lease transaction.

Response: We agree with the commenter and have revised the language at § 413.130(b)(1) accordingly.

H. Costs Attributable to the Negotiation or Settlement

Comment: One commenter suggests that the term "for which any payment" in proposed § 413.134(b)(1)(ii)(G) should be revised to read "for which a particular type or category of payment" because Congress intended that each type or category of these costs (for example, legal fees, accounting and administrative costs, travel costs, feasibility study costs) be viewed individually. For example, the result of such an interpretation would be the following: If in a prior sale of a particular asset, the purchaser incurred, and consequently Medicare paid a share of, only legal fees and accounting costs, and in a subsequent sale of the same asset, the subsequent purchaser incurs feasibility study costs, Medicare should share in the costs of the feasibility study because this type of cost was not paid by Medicare previously.

Response: Section 1861(v)(1)(O)(iii) of the Act treats these negotiation and settlement costs as a homogeneous group. It states that the regulations "shall not recognize, as reasonable in the provision of health care services, costs * * * attributable to the negotiation or settlement of the sale or purchase of any capital asset (by acquisition or merger) for which any payment has previously been made under this title." We interpret this language to mean that if Medicare has previously paid for any of these costs, then no costs in this category will be recognized as reasonable. Therefore, we believe that excluding all subsequent negotiation or settlement costs, even if only one type was previously paid, is consistent with Congressional intent.

Comment: The commenter further believes that § 413.134(b)(1)(ii)(G) should be revised to allow payment for an appraisal if Medicare requires the appraisal for properly determining payment.

Response: We agree with the commenter and have revised § 413.134(b)(1)(ii)(G) accordingly.

Comment: One commenter believes that the proposed rule should provide examples of the type of administrative and accounting costs that are considered costs of negotiating and settling the sale and, thus, are not payable by Medicare. These costs are usually recorded as overhead costs and are not normally associated with a specific function.

Response: The proposed rule excludes from the historical cost of an asset the accounting and administrative costs attributable to the negotiation and

settlement of a sale or purchase. The very act of recording certain accounting and administrative costs as overhead (that is, as operating costs instead of as capital costs) excludes these costs from the historical cost of the asset. However, whether the costs are recorded as general overhead or as an element of the historical cost of the asset, these costs are not considered reasonable Medicare costs if they have been paid for previously under Medicare.

Comment: One commenter suggested that if part of a feasibility study addresses the sale or purchase of a facility, the cost of the study should be allocated between allowable and nonallowable cost. The commenter recommended that the regulations should specifically provide a mechanism for this allocation.

Response: We agree with the commenter that an allocation must be made in these cases, and we will include an allocation method in the program instructions.

Comment: One commenter pointed out that section 1861(v)(1)(O)(iii) of the Act uses the parenthetical phrase "(acquisition or merger)" to modify the phrase "sale or purchase of any capital asset", but the proposed rule has substituted the phrase "merger or consolidation" for the phrase "acquisition or merger." The commenter suggested that the final rule should use the statutory language or explain the difference in meaning between the language in regulations and the language in section 1861(v)(1)(O)(iii) of the Act.

Response: We agree with the commenter. Therefore, we will modify § 413.134(b)(1)(ii)(G) to read "acquisition, merger, or consolidation." This will not be inconsistent with the statutory language because consolidation is a form of acquisition; however, it will be more descriptive of the types of transactions applicable under this section of the regulations.

I. Hospital Based Providers Other Than SNFs

Comment: One commenter recommended that the final rule prescribe the method of allocation to be used for hospital-based providers other than SNFs.

Response: We do not currently specify a method of allocation (although the cost reporting forms "recommend" square feet), and we believe providers are better served if we continue the current flexibility. In general, this allocation is made on the basis of square feet, consistent with other space-related costs.

Comment: One commenter would like the title and text of § 413.134(b)(1)(iii), which concerns the hospital-based providers other than SNFs, to be revised to recognize SNF-based providers.

Response: We agree with the commenter and have revised the language accordingly.

J. Useful Life of Assets

Comment: One commenter stated that the proposed rule does not include a provision governing the useful life of the assets after a purchase and that a logical assumption would be to use the prior owner's remaining useful life. The commenter recommends including in regulations at § 413.134(b)(7) language similar to that set forth in the fifth paragraph of section 104.17 of the Provider Reimbursement Manual (HCFA Pub. 15–1), which states that a different useful life may be approved by the intermediary if the provider's request is properly supported by acceptable factors which affect the determination of useful life.

Response: Regulations at § 413.134(b)(7) comprise essentially the same language in section 104.17 of the Provider Reimbursement Manual. Thus, we do not believe that any purpose would be served by revising § 413.134(b)(7) at this time. Published useful life guidelines do not exist for used assets (which are the subject of this final rule). However, a logical starting point in establishing a useful life for a used asset is the original estimated useful life modified by those factors described in the regulations at § 413.134(b)(7). This is the approach we described in the preamble to the October 26, 1987 proposed rule.

K. Gains and Losses

Comment: Two commenters stated that the "program initiative" to clarify that a gain or loss incurred upon disposition of a depreciable asset has no retroactive effect on the prior year's equity capital should be applied prospectively. The commenters believe that to apply this change retroactively would violate the Administrative Procedure Act. They further stated that it is inconsistent to recapture a gain from a prior year's depreciation and not recompute the equity capital. The commenters suggested that this policy is both incongruous and unreasonable.

Response: As explained in the proposed rule, we are amending the regulations to codify our longstanding policy that a gain or loss on the disposal of depreciable assets has no effect on a proprietary provider's equity capital for years prior to the year of disposition. This policy has been in effect since the beginning of the Medicare program. In 1984, to clear up a misunderstanding of this policy, we issued a clarification to section 130 of the Provider Reimbursement Manual that included the same language that we are now codifying in the regulations. Since we are merely restating this longstanding policy in the regulations, we are not required to give it only prospective effect.

In addition, we do not agree that this policy is unreasonable. The basis for the policy is that a gain or loss does not exist until the year of disposal, and therefore cannot be taken into account in the computation of equity capital for prior years. This policy was recently upheld by the U.S. District Court for the District of Columbia in *Hassler Nursing Center* v. *Sullivan* (New Developments), Medicare and Medicaid Guide (CCH) paragraph 39,631 (D.D.C. Oct. 10, 1991). We continue to believe that it is reasonable.

Comment: One commenter asserted that the rules regarding recapture of depreciation should be revised to reflect the decision of the U.S. District Court for the Middle District of Florida in *Mercy Community Hospital* v. *Heckler* (1988 Transfer Binder), Medicare and Medicaid Guide (CCH) paragraph 36,716 (M.D. Fla. Nov. 24, 1987). That is, the commenter believes that Medicare should seek to recapture depreciation only to the extent that the depreciation claimed did not reflect actual consumption of assets used for patient care. The commenter believes that Medicare should exclude recapture of depreciation if the gain results from inflation or supply and demand characteristics.

Response: The decision cited resulted from remand in the case of *Mercy Community Hospital* v. *Heckler*, 781 F. 2d 1552 (11th Cir. 1986). However, we believe that a more recent decision of the United States Court of Appeals for the First Circuit, *Hoodkroft Convalescent Center* v. *the State of New Hampshire, Division of Human Resources, 879 F. 2d 968 (1st Cir. 1989), cert. denied* 110 S. Ct. 729 (1990), affirms our methodology with respect to adjusting for gains and losses. The First Circuit recognized that the approach urged by the commenters, in which Medicare would attempt to distinguish between gain attributable to less than expected wear-and-tear and gain attributable to inflation and various market factors, would pose substantial administrative problems. The *Hoodkroft* decision was recently followed by the U.S. District Court for the District of Columbia in *Whitecliff, Inc.* v. *Sullivan*

(New Developments), Medicare and Medicaid Guide (CCH) paragraph 39,630 (D.D.C. Oct. 10, 1991).

Section 1861(v)(1)(O)(ii) of the Act requires that our regulations provide for recapture of depreciation in the same manner as provided under the regulations in effect on June 1, 1984. The *Hoodkroft* and *Whitecliff* decisions affirm our policy in effect on June 1, 1984. Accordingly, we believe the statute authorizes continuation of the current method of adjusting for gains and losses.

L. Medicaid Comments

Comment: One commenter asked that the term "solely" (as used in the phrase in § 447.253 "* * * solely as a result of a change in ownership * * *") be defined.

Response: The use of the term "solely" is meant to apply the limit in increases in the valuation of assets only to those increases that are a direct result of a change of ownership. Increases resulting from other factors, such as an annual inflation adjustment applied to the rate, are not included under this term.

If a State's methodology provides for an increase in the valuation of an asset that is neutral with regard to changes of ownership, the increase in the valuation of the asset would not be limited by these provisions. When HCFA incorporates this provision into the State Medicaid Manual, this definition will be included.

Comment: One commenter asked that we specify in a regulation that fair rental value systems are excluded from limitation on the revaluation of assets.

Response: Sections 1902(a)(13) (B) and (C) of the Act require a State to submit an assurance regarding compliance with the limit on the revaluation of assets if there has been a change in ownership. Neither provision provides for an exception to this assurance requirement if a State has adopted a fair rental value system for the payment of capital costs.

These provisions only limit increases that result from a change in ownership. Therefore, in determining whether a State plan methodology is consistent with the statutory requirements, only increases in capital cost payment that have resulted from a change in ownership are subject to this limit. Thus, a State is still required to provide the required revaluation of asset assurance, even though it may be using a fair rental value methodology.

Comment: One commenter recommended that the new provisions in § 447.253 be moved to another location in the regulations to avoid confusion.

Response: These new provisions require that an assurance be submitted by a State regarding the revaluation of assets. This requirement adds another assurance to the existing list of assurances that a State must submit to HCFA before a plan amendment can be approved. The existing assurances are specified in the regulations at § 447.253. Therefore, it is appropriate to incorporate the newest assurance in the same section.

Comment: One commenter wants the final rule to specify that Medicaid capital cost payment for providers that have changed ownership on or after October 1, 1985, is no longer subject to the Medicare upper payment limit rule under § 447.253(b)(2).

Response: Prior to October 1, 1984, the only upper payment limit on Medicaid payment to nursing homes was the Medicare upper payment limit, as specified at § 447.253(b)(2). This limit was not applied to any individual cost item but rather was applied in the aggregate to payments made to long-term care facilities. Section 2314 of Public Law 98–369 established an additional limit for increases in payments for capital costs that result from a revaluation of assets due to a change in ownership.

The intent of Congress in enacting this provision was not to liberalize payment for capital costs for Medicaid providers; rather, the intent was to add an additional limit on a specific cost item. The Conference Report that accompanied Public Law 98–369 (H.R. Rep. No. 861, 98th Cong., 2nd Sess. 1339 (1984)) explains that Congress wished to prohibit artificial increases in capital costs that are due solely to a change in ownership.

In section 1902(a)(13)(C) of the Act as enacted effective October 1, 1985 by section 9509 of Public Law 99–272, Congress intended to allow partial recognition of increases in the valuation of assets limited to one-half of the percentage increase in a specified inflation index. The legislative history of this provision does not support an interpretation that Congress intended to remove capital costs from all of the prior limits. Rather, it is our belief that the purpose of Congress in adding section 1902(a)(13)(C) of the Act was to replace the stringent Medicaid limit required by section 2314 of Public Law 98–369 with a provision that would allow for a limited upward revaluation of assets when there has been a change in ownership. Again, we believe it important to emphasize that the revaluation of asset assurance pertaining to changes of ownership is an additional requirement, separate and distinct from the Medicare upper payment limit requirement described in § 447.253(b)(2).

IV. Regulatory Impact Analysis

A. Executive Order 12291 and Regulatory Flexibility Act

Executive Order (E.O.) 12291 requires us to prepare and publish a regulatory impact analysis for any final rule that meets one of the E.O. criteria for a "major" rule"; that is, that will be likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or any geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States—based enterprises to compete in domestic or export markets.

In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. This final rule will affect hospitals and skilled nursing facilities under the Medicare program and hospitals, nursing facilities, and intermediate care facilities for the mentally retarded under the Medicaid program. For purposes of the RFA, we consider all of these provisions to be small entities.

This final rule revises the Medicare and Medicaid regulations that are affected by section 2314 of Public Law 98–369, enacted on July 18, 1984, and sections 9110 and 9509 of Public Law 99–272, enacted on April 7, 1986. This rule describes new limitations on the valuation of assets acquired as the result of changes in ownership occurring on or after July 18, 1984.

The statutory changes were largely self-implementing and have already created significant savings for the Medicare and Medicaid programs, starting in 1984. These regulations will create little incremental effect. The only consequential new effect will arise from provisions concerning lease purchase agreements entered into after the regulations become effective. We do not believe that a substantial savings will result from this, or that many such transactions will be significantly affected. Therefore, we certify that this final rule will not have a significant effect on a substantial number of small entities. However, we have prepared the following analysis covering the impact of the above statutory provisions and the final rule, taken together.

In the period beginning September 1, 1989 and ending March 31, 1991, there have been the following changes of ownership of active providers by facility type:

TABLE I.—CHANGES OF OWNERSHIP OF ACTIVE PROVIDERS BY FACILITY TYPE

[September 1, 1989 to March 31, 1991]

	Total No. of facilities	No. of facilities with changes of ownership
SNFs		
Medicare	723	15
Medicare/ Medicaid	8,709	661
NFs (Medicaid only)	6,394	395
ICFs/MR (Medicaid only)	5,800	136
Hospitals (Medicare or Medicare/Medicaid	6,531	162

1. Background

Since the beginning of the Medicare and Medicaid programs, providers increasingly have been involved in mergers and acquisitions. These transactions have involved both chain organizations and single facilities. Under current payment rules, mergers and acquisitions most often result in increased levels of Medicare and Medicaid payments. This occurs because the acquiring entity usually pays more for the acquired assets than the amount at which they are carried on the records of the prior owner. This higher amount, then, becomes the basis upon which Medicare and Medicaid payments are determined. There has been a justified concern that the Medicare and Medicaid programs are paying more for the same assets, solely as a result of changes in ownership, with no concurrent increase in patient care. The changes in this final rule are intended to promote economy in these programs. We have also gathered information on several of the recent major multifacility acquisitions. We are examining this information to determine the potential consequences of these mergers and acquisitions on Medicare and Medicaid program costs.

Effective October 1, 1991, the Medicare payment methodology for inpatient capital-related costs for hospitals paid under the prospective payment system has been revised (56 FR 43196). A prospective payment methodology has replaced the reasonable cost-based payment methodology for capital-related costs. However, SNFs are still paid for their patient-care-related capital costs on a reasonable cost basis; that is, for SNFs, Medicare generally pays the percentage of capital costs that reflect the ratio of Medicare utilization to total utilization.

Available data indicate a great variation among hospitals in terms of the ratio of capital costs to total operating costs. For about one quarter of the hospitals, capital costs are less than 4 percent of operating costs. Slightly over one half of the hospitals claim capital costs between 4 and 10 percent. The remaining number of hospitals have capital cost to operating cost ratios of between 10 and 20 percent.

Currently, under Medicaid, States have broad discretion in designing payment methods and standards for hospital, nursing facility, and ICF/MR services. States have used that discretion to implement a wide variety of payment methodologies and policies to account for providers' capital expenditures. Only a few States reference and adopt Medicare principles in accounting for capital costs for long-term care payment. Some States have established their own limits on payment of these costs. Due to this variation in State practices and the absence of data about Medicaid capital expenditures, we are not able to estimate current Federal or State Medicaid expenditures for capital expenses.

2. Effect on Providers

It is clear that Congress intends to limit upward revaluations of assets upon a change of ownership of a hospital, SNF, nursing facility or an ICF/MR. Thus, these entities are affected by these provisions in several ways.

Since the enactment of section 2314 of Public Law 98–369, we have not been made aware of any evidence that would suggest that these provisions would have a significant effect on provider decisions regarding mergers and acquisitions. Mergers and acquisitions evolve from a pro-merger environment that is caused by factors such as excess bed capacity, new technologies, and changes in social demographics (for example, changes in the composition of the service area's population that, in turn, would affect utilization and have an effect on revenues). Consequently, the hospital and long-term care facility industries have been restructuring themselves primarily to take advantage of the current pro-merger environment.

Economics is often the driving force in mergers and acquisitions. For many providers facing financial difficulties and looking for sources of funding for the needs of operations and capital formation, mergers and acquisitions offer an attractive alternative to prolonged financial difficulty. Thus, we believe that factors like tax incentives, increased buying power, and market entry initiatives for corporate expansion, which were not affected by section 2314 of Public Law 98–369 and will not be affected by this final rule, have and will continue to offset in good measure any disincentives that might be created with respect to decisions to merge or acquire. Therefore, on balance, we believe that neither section 2314 of Public Law 98–369 nor this final rule will inhibit current levels of merger or acquisition activities.

However, providers have been and will continue to be affected by the reduction of Medicare and Medicaid payment for capital expenses as a result of the enactment of section 2314 of Public Law 98–369. We are not able to estimate the effect this provision has had or will have on Medicare payments to providers because we do not have data that would indicate the number of transactions involving revaluations of assets that have been affected by section 2314 of Public Law 98–369, nor do we have data that estimate the number of future transactions that will be affected by the provisions of the legislation in this final rule. Absent this information, we could not predict the value of the transactions, with the result that information concerning the original cost of each acquisition to determine depreciation costs is not available. Therefore, a detailed analysis of the effect of this final rule on the Medicare and Medicaid program expenditures is not possible at this time. Nonetheless, despite this limitation, program experience allows us to analyze and rank the potential effects of several of the key provisions of this rule, as follows:

a. *Depreciation and interest expense.* These provisions have had and will continue to have the most significant effect on the Medicare and Medicaid programs. Our experience indicates that many provider acquisitions are for amounts as much as two to five times the cost to the previous owner, who may not have been the owner of record under the proposed historical cost definitions. Eliminating the upward revaluation of assets in these acquisitions maintains a level historical cost basis for purposes of computing depreciation and interest expense. This change, coupled with the exclusion of costs attributable to the negotiation or settlement of the purchase or sale of any capital asset for which any Medicare payment has previously been made, has resulted and will continue to result in significant savings.

b. *Sale and leaseback arrangements and lease purchase transactions.* We believe that these provisions rank second in terms of potential program savings and could affect many providers. The provisions effecting sale and leaseback arrangements will avoid possible provider circumvention of the revaluation of assets limit that restricts payment of patient-care-related capital costs. Beginning with the effective date of this final rule, October 23, 1992, we are limiting allowable costs under all sale and leaseback arrangements entered into by hospitals and SNFs to the amount the provider would have included in its allowable costs had the provider retained legal title to the facilities or equipment. Also, as a program initiative not related to section 2314 of Public Law 98–369, we are implementing new criteria for defining lease purchase agreements. In addition, we explain that the limitation on adjustments to depreciation for the purpose of determining any gain or loss upon the disposal of lease purchase assets includes any amount considered as depreciation for the purpose of computing the limitation on allowable rental costs. It is our belief that savings will increase under these provisions.

c. *Return on equity capital of proprietary SNFs.* Nonprofit providers and proprietary providers other than SNFs are not subject to the return on equity changes, and, therefore, will not be affected by them. However, with respect to proprietary SNFs, limiting the historical cost of assets by prohibiting upward revaluations of assets has reduced the basis of the assets used in the computation of the return on equity capital. Moreover, we are continuing our existing policy that any loan, or portion thereof, that is made to finance the excess of the total acquisition cost over the allowable acquisition cost of a facility, or of any tangible assets of a facility, would be excluded from the equity capital computation, because such excess is not considered related to patient care. Thus, we are not paying for the increased financial liability incurred by proprietary SNFs in their mergers and acquisitions of other facilities and assets.

3. Medicaid Provisions

We do not have a basis on which to estimate or rank the effect of the Medicaid provisions. Most States have initiated a variety of actions to control provider payment, including payment for capital costs. We believe there will be Federal and State savings resulting from these actions, but due to the variation in State practices, and because of the absence of good data about the effect of State payment policies, we cannot estimate the budgetary effect on the Medicaid program.

B. Rural Hospital Impact Statement

Section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final rule may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612). For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside of a Metropolitan Statistical Area.

We are not preparing a rural hospital impact statement since we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

C. Summary

In summary, we expect that this final rule, by limiting upward revaluations of assets upon a change of ownership of a hospital, SNF, nursing facility, or ICF/MR, will promote economy in the Medicare and Medicaid programs. Many of these policies are already in effect; the regulations text is merely being conformed to them. We have noted our limitations in estimating the effect of this final rule, but we are certain that both Medicare and Medicaid program savings will result from the implementation of this final rule. Further, the effect on hospitals in the Medicare program would be limited because the new prospective payment system for capital related costs is in effect for cost reporting periods beginning on or after October 1, 1991.

V. Other Required Information

Paperwork Reduction Act

Regulations at § 447.253(a) refer to § 447.255, which contains information collection requirements that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). The information collection requirements concern the revaluation of assets assurance required by sections 1902(a)(13)(B) and (C) of the Act. The respondents who will provide the information include Medicaid State agencies. Public reporting burden for this collection of information is estimated to be no more than one hour per State plan amendment. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the OMB official whose name appears in the "ADDRESS" section of this preamble.

List of Subjects

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 447

Accounting, Clinics, Contracts (Agreements), Copayments, Drugs, Grant-in-Aid Program—Health, Health facilities, Health professions, Hospitals, Medicaid, Nursing homes, Payments for services: General, Payments: Timely claims, Reimbursement, Rural areas.

42 CFR chapter IV is amended as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

A. The authority citation for part 413 continues to read as follows:

Authority: Sec. 1102, 1814(b), 1815, 1833 (a), (i) and (n), 1861(v), 1871, 1881, 1883, and 1886, of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395g, 1395l (a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); sec. 104(c) of Pub. L. 100–360 as amended by sec. 608(d)(3) of Pub. L. 100–485 (42 U.S.C. 1395ww (note)); and sec. 101(c) of Pub. L. 101–234 (42 U.S.C. 1395ww (note)).

B. Part 413, subpart G is amended as follows:

Subpart G—Capital-Related Costs

1. In § 413.130, paragraphs (b)(1) and (b)(2) are revised; paragraphs (b)(4), (b)(5), and (b)(6) are redesignated as paragraphs (b)(5), (b)(6), and (b)(7) respectively; new paragraph (b)(4) is added; newly redesignated paragraph (b)(5) is revised; newly redesignated paragraph (b)(6)(i) is amended by revising the cross reference "(b)(4)" to read "(b)(5)"; and new paragraphs (b)(8) and (b)(9) are added to read as follows:

§ 413.130 Introduction to capital-related costs.

* * * * *

(b) *Leases and rentals.*

(1) Subject to the qualifications of paragraphs (b) (2), (4), (5), and (8) of this section, leases and rentals, including licenses and royalty fees, are includable in capital-related costs if they relate to the use of assets that would be depreciable if the provider owned them outright or they relate to land, which is neither depreciable nor amortizable if

owned outright. The terms *"leases"* and *"rentals of assets"* signify that a provider has possession, use, and enjoyment of the assets.

(2) For sale and leaseback agreements for hospitals and SNFs entered into before October 23, 1992 and for sale and leaseback agreements for other providers entered into at any time, a provider may include incurred rental charges in its capital-related costs, as specified in a sale and leaseback agreement with a nonrelated purchaser (including shared service organizations not related within the meaning of § 413.17) involving plant facilities or equipment only if the following conditions are met:

(i) The rental charges are reasonable based on the following—

(A) Consideration of rental charges of comparable facilities and market conditions in the area;

(B) The type, expected life, condition, and value of the facilities or equipment rented; and

(C) Other provisions of the rental agreements.

(ii) Adequate alternative facilities or equipment that would serve the purpose are not or were not available at lower cost.

(iii) The leasing was based on economic and technical considerations.

* * * * *

(4) For sale and leaseback agreements for hospitals and SNFs entered into on or after October 23, 1992, the amount a provider may include in its capital-related costs as rental or lease expense may not exceed the amount that the provider would have included in capital-related costs had the provider retained legal title to the facilities or equipment, such as interest expense on mortgages, taxes, depreciation, and insurance costs (the costs of ownership). This limitation applies both on an annual basis and over the useful life of the asset.

(i) If in the early years of the lease, the annual rental or lease costs are less than the annual costs of ownership, but in the later years of the lease the annual rental or lease costs are more than the annual costs of ownership, in the years that the annual rental or lease costs are more than the annual costs of ownership, the provider may include in capital-related costs annually the actual amount of rental or lease costs. The aggregate rental or lease costs included in capital-related costs may not exceed the aggregate costs of ownership that would have been included in capital-related costs over the useful life of the asset had the provider retained legal title to the asset.

(ii) If in the early years of the lease, the annual rental or lease costs exceed the annual costs of ownership, but in the later years of the lease the annual rental or lease costs are less than the annual costs of ownership, the provider may carry forward amounts of rental or lease costs that were not included in capital-related costs in the early years of the lease due to the costs of ownership limitation, and include these amounts in capital-related costs in the years of the lease when the annual rental or lease costs are less than the annual costs of ownership.

(iii) In any given year the amount of actual annual rental or lease costs plus the amount carried forward to that year may not exceed the amount of the costs of ownership for that year.

(iv) In the aggregate, the amount of rental or lease costs included in capital-related costs may not exceed the amount of the costs of ownership that the provider could have included in capital-related costs had the provider retained legal title to the asset.

(5) For lease purchase transactions entered into before October 23, 1992, a lease that meets the following conditions establishes a virtual purchase:

(i) The rental charge exceeds rental charges of comparable facilities or equipment in the area.

(ii) The term of the lease is less than the useful life of the facilities or equipment.

(iii) The provider has the option to renew the lease at a significantly reduced rental, or the provider has the right to purchase the facilities or equipment at a price that appears to be significantly less than what the fair market value of the facilities or equipment would be at the time acquisition by the provider is permitted.

* * * * *

(8) For lease purchase transactions entered into on or after October 23, 1992, a lease that meets any one of the following conditions establishes a virtual purchase:

(i) The lease transfers title of the facilities or equipment to the lessee during the lease term.

(ii) The lease contains a bargain purchase option.

(iii) The lease term is at least 75 percent of the useful life of the facilities or equipment. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the facilities or equipment.

(iv) The present value of the minimum lease payments (payments to be made during the lease term including bargain purchase option, guaranteed residual value, and penalties for failure to renew) equals at least 90 percent of the fair market value of the leased property. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the facilities or equipment. Present value is computed using the lessee's incremental borrowing rate, unless the interest rate implicit in the lease is known and is less than the lessee's incremental borrowing rate, in which case the interest rate implicit in the lease is used.

(9)(i) If a lease establishes a virtual purchase under paragraph (b)(8) of this section, the rental charge is includable in capital-related costs to the extent that it does not exceed the amount that the provider would have included in capital-related costs if it had legal title to the asset (the cost of ownership). The cost of ownership includes straight-line depreciation, insurance, and interest. For purposes of computing the limitation on allowable rental cost in this paragraph, a provider may not include accelerated depreciation.

(ii) The difference between the amount of rent paid and the amount of rent allowed as capital-related costs is considered a deferred charge and is capitalized as part of the historical cost of the asset when the asset is purchased.

(iii) If an asset is returned to the owner instead of being purchased, the deferred charge may be included in capital-related costs in the year the asset is returned.

(iv) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase still exists, the deferred charge may be included in capital-related costs to the extent of increasing the reduced rental to an amount not in excess of the cost of ownership.

(v) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase no longer exists, the deferred charge may be included in capital-related costs to the extent of increasing the reduced rental to a fair rental value.

(vi) If the lessee becomes the owner of the leased asset (either by operation of the lease or by other means), the amount considered as depreciation, for the purpose of having computed the limitation on rental charges in paragraph (b)(9)(i) of this section, must be used in calculating the limitation on adjustments for the purpose of determining any gain or loss under § 413.134(f) upon disposal of an asset.

* * * * *

2. In § 413.134, the introductory text of paragraph (a) is republished; paragraph (a)(2), the heading of paragraph (b), and

paragraph (b)(1) are revised; new paragraphs (b)(8) and (b)(9) are added; paragraphs (f)(1), (f)(4) and (g)(2) are revised; paragraph (g)(3) is redesignated as (g)(4) and revised; a new paragraph (g)(3) is added; newly redesignated paragraph (g)(4) is revised; current paragraphs (h) through (k) are redesignated as paragraphs (i) through (l), respectively; a new paragraph (h) is added; and newly redesignated paragraph (j) is revised to read as follows:

§ 413.134 Depreciation: Allowance for depreciation based on asset costs.

(a) *Principle.* An appropriate allowance for depreciation on buildings and equipment used in the provision of patient care is an allowable cost. The depreciation must be—

* * * * *

(2) Based on the historical cost of the asset, except as specified in paragraph (j) of this section regarding donated assets; and

* * * * *

(b) *General rules.*—(1) Historical cost. Historical cost is the cost incurred by the present owner in acquiring the asset.

(i) *All providers.* For depreciable assets acquired after July 31, 1970, and for a hospital or a SNF, acquired before July 18, 1984, the historical cost may not exceed the lower of current reproduction cost adjusted for straight-line depreciation over the life of the asset to the time of the purchase or the fair market value of the asset at the time of its purchase.

(ii) *Hospitals and SNFs only.* (A) For assets acquired on or after July 18, 1984 and not subject to an enforceable agreement entered into before that date, historical cost may not exceed the lowest of the following:

(*1*) The allowable acquisition cost of the asset to the owner of record as of July 18, 1984 (or, in the case of an asset not in existence as of July 18, 1984, the first owner of record of the asset after that date);

(*2*) The acquisition cost of the asset to the new owner; or

(*3*) The fair market value of the asset on the date of acquisition.

(B) For purposes of applying paragraph (b)(1)(ii)(A) of this section, an asset not in existence as of July 18, 1984 includes any asset that physically existed, but was not owned by a hospital or SNF participating in the Medicare program as of July 18, 1984.

(C) The acquisition cost to the owner of record is subject to any limitation on historical costs described in paragraphs (b)(1)(i) or (g)(1) and (2) of this section, and is not reduced by any depreciation taken by the owner of record. This limitation on historical cost is also applied to the purchase of land, a capital asset that is neither depreciable nor amortizable under any circumstances. (See §§ 413.153(d) and 413.157(b) for application of the limitation to the cost of land for purposes of determining allowable interest expense and return on equity capital or proprietary providers.)

(D) Acquisition cost to the owner of record includes the costs of betterments or improvements that extend the estimated useful life of an asset at least two years beyond its original estimated useful life or increase the productivity of an asset significantly over its original productivity.

(E) For assets acquired prior to a hospital's or SNF's entrance into the Medicare program, the acquisition cost to the owner of record is the historical cost of the asset when acquired, rather than when the hospital or SNF entered the program.

(F) For assets subject to the optional depreciation allowance as described in § 413.139, the acquisition cost to the owner of record is the historical cost established for those assets when the hospital or SNF changed to actual depreciation as described in § 413.139(e). If the hospital or SNF did not change to actual depreciation, as described in § 413.139(e), for optional allowance assets, the acquisition cost to the owner of record is established by reference to the hospital's or SNF's recorded historical cost of the asset when acquired. If the hospital or SNF has no historical cost records for optional allowance assets, the acquisition cost to the owner of record is established by appraisal.

(G) The historical cost of an asset acquired on or after July 18, 1984 may not include costs attributable to the negotiation or settlement of the sale or purchase (by acquisition, merger, or consolidation) of any capital asset for which any payment was previously made under the Medicare program. The costs to be excluded include, but are not limited to, appraisal costs (except those incurred at the request of the intermediary under paragraph (f)(2)(iv) of this section), legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies.

(iii) *Hospital-based providers other than SNFs and SNF-based providers.* For changes of ownership that involve assets of a hospital-based provider other than a SNF, or assets of a SNF-based provider, the provisions of paragraph (b)(1)(ii) of this section are not applicable. A reasonable allocation of the purchase price must be made, so that the hospital-based provider other than a SNF, or a SNF-based provider, is not affected by the limitations described in paragraph (b)(1)(ii) of this section. The historical cost of assets of providers other than hospitals and SNFs is governed by paragraph (b)(1)(i) of this section.

* * * * *

(8) *Donated asset.* An asset is considered donated when the provider acquires the asset without making payment in the form of cash, new debt, assumed debt, property or services. Exempt as provided in paragraph (j)(3) of this section, if a provider makes payment in any form to acquire an asset, the payment is considered the purchase price for the purpose of determining allowable historical cost.

(9) *Net book value.* The net book value of an asset is the depreciable basis used for the Medicare program by the asset's last participating owner less depreciation recognized under the Medicare program.

* * * * *

(f) *Gains and losses on disposal of assets—(1) General.* Depreciable assets may be disposed of through sale, scrapping, trade-in, exchange, demolition, abandonment, condemnation, fire, theft, or other casualty. If disposal of a depreciable asset results in a gain or loss, an adjustment is necessary in the provider's allowable cost. The amount of a gain included in the determination of allowable cost is limited to the amount of depreciation previously included in Medicare allowable costs. The amount of a loss to be included is limited to the undepreciated basis of the asset permitted under the program. The treatment of the gain or loss depends upon the manner of disposition of the asset, as specified in paragraphs (f) (2) through (6) of this section. The gain or loss on the disposition of depreciable assets has no retroactive effect on a proprietary provider's equity capital for years prior to the year of disposition.

* * * * *

(4) *Exchange, trade-in or donation.* Gains or losses realized from the exchange, trade-in, or donation of depreciable assets are not included in the determination of allowable cost. When the disposition of an asset is by means of exchange, trade-in, or donation, the historical cost of the new asset is the sum of the undepreciated cost of the asset disposed of and the additional cash or other assets transferred (or to be transferred) to acquire the new asset. However, if the asset disposed of was acquired by the provider before its participation in the

Medicare program and the sum of the undepreciated cost and the cash or other assets transferred (or to be transferred) exceed the list price or fair market value of the new asset, the historical cost of the new asset is limited to the lower of its list price or fair market value.

* * * * *

(g) *Establishment of cost basis on purchase of facility as an ongoing operation.* * * *

(2) *Assets acquired after July 31, 1970 and, for hospitals and SNFs, before July 18, 1984.*

For depreciable assets acquired after July 31, 1970 and, for hospitals and SNFs, before July 18, 1984, in addition to the limitations specified in paragraph (g)(1) of this section, the cost basis of the depreciable assets may not exceed the current reproduction cost depreciated on a straight-line basis over the life of the asset to the time of the sale.

(3) *Assets acquired by hospitals and SNFs on or after July 18, 1984 and not subject to an enforceable agreement entered into before that date.*

Subject to paragraphs (b)(1)(ii) (B) through (G) and (b)(1)(iii) of this section, historical cost may not exceed the lowest of the following:

(i) The allowable acquisition cost of the asset to the owner of record as of July 18, 1984 (or, in the case of an asset not in existence as of July 18, 1984, the first owner of record of the asset);

(ii) The acquisition cost to the new owner; or

(iii) The fair market value of the asset on the date of acquisition.

(4) *Transactions other than bona fide.* If the purchaser cannot demonstrate that the sale was bona fide, in addition to the limitations specified in paragraph (g)(1), (2), and (3) of this section, the purchaser's cost basis may not exceed the seller's cost basis, less accumulated depreciation.

(h) *Sale and leaseback agreements and other lease transactions.* (1) For sale and leaseback agreements for all providers, and for sale and leaseback agreements for hospitals and SNFs entered into before October 23, 1992, a provider may include in its allowable costs incurred rental charges, as specified in a sale and leaseback agreement with a nonrelated purchaser involving plant facilities or equipment, only if—

(i) The rental charges are reasonable based on consideration of rental charges of comparable facilities and market conditions in the area; the type, expected life, condition, and value of the facilities or equipment rented; and other provisions of the rental agreement;

(ii) Adequate alternate facilities or equipment that would serve the purpose are not or were not available at lower cost; and

(iii) The leasing was based on economic and technical considerations.

(2) If the conditions of paragraph (h)(1) of this section are not met, the amount a provider may include in its allowable costs as rental or lease expense under a sale and leaseback agreement may not exceed the amount that the provider would have included in its allowable costs had the provider retained legal title to the facilities or equipment such as interest expense on mortgages, taxes, depreciation, and insurance costs.

(3) For hospitals and SNFs entering into sale and leaseback agreements on or after October 23, 1992, the amount a provider may include in its allowable costs as rental or lease expense may not exceed the amount that the provider would have included in its allowable costs had the provider retained legal title to the facilities or equipment for costs such as interest expense on mortgages, taxes, depreciation, and insurance costs (the costs of ownership). This limitation applies both on an annual basis and over the useful life of the asset.

(i) If in the early years of the lease, the annual rental or lease costs are less than the annually costs of ownership, but in the later years of the lease the annual rental or lease costs are more than the annual costs of ownership, in the years that the annual rental or lease costs are more than the costs of ownership the provider may include in allowable costs annually the actual amount of rental or lease costs. The aggregate rental or lease costs included in allowable costs may not exceed the aggregate costs of ownership that would have been included in allowable costs over the useful life of the asset had the provider retained legal title to the asset.

(ii) If in the early years of the lease, the annual rental or lease costs exceed the annual costs of ownership, but in the later years of the lease the annual rental or lease costs are less than the annual costs of ownership, the provider may carry forward amounts of rental or lease costs that were not included in allowable costs in the early years of the lease due to the costs of ownership limitation, and include these amounts in allowable costs in the years of the lease when the annual rental or lease costs are less than the annual costs of ownership. In any given year the amount of actual annual rental or lease costs plus the amount carried forward to that year may not exceed the amount of the costs of ownership for that year.

(iii) In the aggregate, the amount of rental or lease costs included in allowable costs may not exceed the amount of the costs of ownership that the provider could have included in allowable costs had the provider retained legal title to the asset.

(4) For lease transactions of all providers entered into before October 23, 1992, a lease that meets the following conditions establishes a virtual purchase:

(i) The rental charge exceeds rental charges of comparable facilities or equipment in the area.

(ii) The term of the lease is less than the useful life of the facilities or equipment.

(iii) The provider has the option to renew the lease at a significantly reduced rental, or the provider has the right to purchase the facilities or equipment at a price that appears to be significantly less than what the fair market value of the facilities or equipment would be at the time acquisition by the provider is permitted.

(5)(i) If a lease is a virtual purchase under paragraph (h)(4) of this section, the rental charge is includable in allowable costs only to the extent that it does not exceed the amount that the provider would have included in allowable costs if it had legal title to the asset (the cost of ownership), such as straight-line depreciation, insurance, and interest. For purposes of computing the limitation on allowable rental cost in this paragraph, a provider may not include accelerated depreciation.

(ii) The difference between the amount of rent paid and the amount of rent allowed as rental expense is considered a deferred charge and must be capitalized as part of the historical cost of the asset when the asset is purchased.

(iii) If an asset is returned to the owner instead of being purchased, the deferred charge may be expensed in the year the asset is returned.

(iv) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase still exists, the deferred charge may be expensed to the extent of increasing the reduced rental to an amount not in excess of the cost of ownership.

(v) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase no longer exists, the deferred charge may be expensed to the extent of increasing the reduced rental to a fair rental value.

(6) For lease transactions entered into on or after October 23, 1992, a lease that meets any one of the following

conditions establishes a virtual purchase:

(i) The lease transfers title of the facilities or equipment to the lessee during the lease term.

(ii) The lease contains a bargain purchase option.

(iii) The lease term is 75 percent or more of the useful life of the facilities or equipment. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the facilities or equipment.

(iv) The present value of the minimum lease payments (that is, payments to be made during the lease term, including bargain purchase option, guaranteed residual value, or penalties for failure to renew) equals 90 percent or more of the fair market value of the leased property. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the facilities or equipment. The present value is computed using the lessee's incremental borrowing rate, unless the interest rate implicit in the lease is known and is less than the lessee's incremental borrowing rate, in which case, the interest rate implicit in the lease is used.

(7)(i) If a lease is a virtual purchase under paragraph (h)(6) of this section, the rental charge is includable in allowable costs only to the extent that it does not exceed the amount that the provider would have included in allowable costs if it had legal title to the asset (the costs of ownership), such as straight-line depreciation, insurance, and interest. For purposes of computing the limitation on allowable rental cost as described in this paragraph, a provider may not include accelerated depreciation in its allowable costs.

(ii) The difference between the amount of rent paid and the amount of rent allowed as rental expense is considered a deferred charge and is capitalized as part of the historical cost of the asset when the asset is purchased.

(iii) If an asset is returned to the owner instead of being purchased, the deferred charge may be expensed in the year the asset is returned.

(iv) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase still exists, the deferred charge may be expensed to the extent of increasing the reduced rental to an amount not in excess of the cost of ownership.

(v) If the term of the lease is extended for an additional period of time at a reduced lease cost and the option to purchase no longer exists, the deferred charge may be expensed to the extent of increasing the reduced rental to a fair rental value.

(vi) If the lessee becomes the owner of the leased asset (either by operation of the lease or by other means), the amount considered as depreciation, for the purpose of having computed the limitation expressed in paragraph (h)(7)(i) of this section, must be used in calculating the limitation on adjustments to depreciation for the purpose of determining any gain or loss upon disposal of an asset under paragraph (f) of this section.

* * * * *

(j) *Basis of assets donated to a provider*—(1) Assets not used or depreciated under the Medicare program. If an asset has never been used or depreciated under the Medicare program and is donated to a provider, the basis for the purpose of calculating depreciation and equity capital (if applicable) is the fair market value of the asset at the time of donation.

(2) *Assets used or depreciated under the Medicare program.* If an asset has been used or depreciated under the Medicare program and is donated to a provider, the basis for the purpose of calculating depreciation and equity capital (if applicable) is the lesser of—

(i) The fair market value at the time of donation; or

(ii) The net book value in the hands of the owner last participating in the Medicare program.

(3) *Transfers of State hospitals to nonprofit corporations without monetary consideration.* If a State transfers a hospital to a nonprofit corporation without monetary consideration on or after July 18, 1984, the depreciable basis of the assets to the new owner is the net book value of the assets as recorded on the State's books at the time of the transfer. For purposes of this section, monetary consideration includes cash, new debt, and assumed debt.

* * * * *

C. Part 447, subpart C is amended as set forth below:

PART 447—PAYMENTS FOR SERVICES

Subpart C—Payment for Inpatient Hospital and Long-Term Care Facility Services

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 447.250, paragraph (c) and (d) are redesignated as paragraphs (d) and (e), respectively; and a new paragraph (c) is added to read as follows:

§ 447.250 Basis and purpose.

* * * * *

(c) Sections 447.253 (c) and (d) implement sections 1902(a)(13)(B) and 1902(a)(13)(C) of the Act, which require a State Medicaid agency to make certain assurances to the Secretary regarding increases in payments resulting solely from changes in ownerships of hospitals, NFs, and ICFs/MR.

* * * * *

3. In § 447.253, paragraph (a) is amended by changing "paragraphs (b) through (g)" to "paragraphs (b) through (i);" paragraphs (c) through (g) are redesignated as paragraphs (e) through (i), respectively; and new paragraphs (c) and (d) are added to read as follows:

* * * * *

(c) *Changes in ownership of hospitals.* In determining payment when there has been a sale or transfer of the assets of a hospital, the State's methods and standards must provide that payment rates can reasonably be expected not to increase in the aggregate solely as a result of changes of ownership, more than the payments would increase under Medicare under §§ 413.130, 413.134, 413.153, and 413.157 of this chapter, insofar as these sections affect payments for depreciation, interest on capital indebtedness, return on equity capital (if applicable), acquisition costs for which payments were previously made to prior owners, and the recapture of depreciation.

(d) *Changes in ownership of NFs and ICFs/MR.* In determining payment when there has been a sale or transfer of assets of an NF or ICF/MR, the State's methods and standards must provide the following depending upon the date of the transfer.

(1) For transfers on or after July 18, 1984 but before October 1, 1985, the State's methods and standards must provide that payment rates can reasonably be expected not to increase in the aggregate, solely as the result of a change in ownership, more than payments would increase under Medicare under §§ 413.130, 413.134, 413.153 and 413.157 of this chapter, insofar as these sections affect payment for depreciation, interest on capital indebtedness, return on equity capital (if applicable), acquisition costs for which payments were previously made to prior owners, and the recapture of depreciation.

(2) For transfers on or after October 1, 1985, the State's methods and standards must provide that the valuation of capital assets for purposes of determining payment rates for NFs and ICFs/MR is not to increase (as measured

from the date of acquisition by the seller to the date of the change of ownership) solely as a result of a change of ownership, by more than the lesser of—

(i) One-half of the percentage increase (as measured from the date of acquisition by the seller to the date of the change of ownership, or, if necessary, as extrapolated retrospectively by the Secretary) in the Dodge construction index applied in the aggregate with respect to those facilities that have undergone a change of ownership during the fiscal year; or

(ii) One-half of the percentage increase (as measured from the date of acquisition by the seller to the date of the change of ownership) in the Consumer Price Index for All Urban Consumers (CPI-U) (United States city average) applied in the aggregate with respect to those facilities that have undergone a change of ownership during the fiscal year.

* * * * *

(Catalog of Federal Domestic Assistance Programs No. 93.773, Medicare-Hospital Insurance Program and No. 93.778, Medical Assistance Program)

Dated: November 9, 1991.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

Approved: March 3, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 92-22582 Filed 9-22-92; 8:45 am]

BILLING CODE 4120-01-M

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42 CFR Parts 431, 442, 447, 483, 488, 489, and 498

[BPD-396-F]

RIN 0938-AD 12

Medicare and Medicaid; Requirements for Long Term Care Facilities

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: In Federal Register document 91-22274, published on Thursday, September 26, 1991, beginning on page 48826, we amended Medicare and Medicaid rules applicable to requirements for long term care facilities. In addition to correcting typographical errors, we are making a limited number of technical corrections to our September 26, 1991 document to take into account changes made by other regulations, but not included in the document, or inconsistencies between preamble statements and the regulations text. All such technical corrections are explained in the preamble to this rule.

EFFECTIVE DATES: This final rule is effective on September 23, 1992.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Lindsay, (410) 966-4673.

SUPPLEMENTARY INFORMATION: On September 26, 1991, in the **Federal Register** document 91-22274, we published a final rule, Requirements for Long Term Care Facilities, that included revisions to 42 CFR parts 442, 447, 483, 488, 489, and 498. The document contained a number of typographical errors and inadvertent omissions. This final rule corrects those obvious errors.

We are deleting § 431.610(g)(1)(ii) from the Medicaid regulations as a conforming technical correction, since the corresponding § 488.11(d) was removed from the Medicaid regulations by the final rule (56 FR 48879). The long term care facility staffing information required by this regulation is no longer required of the facility. States must still submit some full-time equivalent staffing information as part of their submission of HCFA Form 671, which in turn is reviewed by the survey team and input into the Health Care Financing Administration Online Survey Certification and Reporting System.

In preparing the final rule, we failed to take into account changes made to part 442, Standards for Payment for Skilled Nursing and Intermediate Care Facility Services, by a final rule entitled, Correction and Reduction Plans for Intermediate Care Facilities for the Mentally Retarded, published on July 5, 1991 (56 FR 30696). As a result, we inadvertently included obsolete regulatory text in §§ 442.105(e) and 442.110(a) and we are deleting that material.

In our review of the correctness of part 442, we determined that an error had occurred in a final rule with comment, Requirements for Long Term Care Facilities (54 FR 5316), that we published on February 2, 1989. In that rule, we deleted § 442.251 which had required that intermediate care facilities (ICFs) meet requirements for State licensure, because the requirements for ICFs had been subsumed by the new requirements for nursing facilities (NFs). However, we failed to note that the deleted requirement not only applied to ICFs but to ICFs for the mentally retarded (ICFs/MR) as well. As a result of this deletion, there is no regulation requiring ICFs/MR to be licensed. Because this subject is now included in part 483, Requirements for States and Long Term Care Facilities, we are adding a new § 483.410(e) to restore this requirement.

We are making a technical correction to § 483.10, Resident Rights. In paragraph (b)(2)(i), which concerns notice of rights and services, we reflect a statutory clarification (enacted in sections 4008(h)(2)(H) and 4801(e)(9) of the Omnibus Budget Reconciliation Act of 1990) that was inadvertently omitted from the regulations. The correction clarifies that the resident's right of access to clinical records within 24 hours of request refers to all current records pertaining to the resident, and excludes weekends and holidays in determining the 24-hour period. In addition, we are correcting § 483.10(c)(4)(ii) by adding the word "and" before the phrase "on request" to comply with the change explained in the preamble on 56 FR 48838. That is, in addition to providing information concerning a resident's personal funds on request to the resident and his or her legal representative, a nursing facility must also provide this information on a quarterly basis. We are also making a technical correction to § 483.10(g)(1), regarding examination of survey results, to include a clarification discussed in the preamble to the interim final rule published on February 2, 1989 (54 FR 5348). We clarify that, while a facility must make survey results available in a readable form for examination in a place readily accessible to residents, the facility need only "post" (i.e., affix to a wall) a notice of the availability of the survey results, rather than the entire set of documents comprising the results themselves.

We are making a technical correction to § 483.20(d)(1), by revising unclear language in the second sentence. This language was intended to explain the relationship of the plan of care to the requirement contained in the introductory statement to § 483.25. The latter provision reflects provisions in sections 1819(b)(2) and 1919(b)(2) of the Act, which require a facility to provide the services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care. In attempting to meet this broad mandate, a facility may sometimes encounter conflicts between its overall responsibility to provide services and the resident's exercise of specific rights under § 483.10. For example, a resident, in exercising the right to refuse treatment (§ 483.10(b)(4)), may decline a particular service for which the facility would normally be responsible under § 483.25. However, we note that § 483.25 mandates the facility to provide services only to the extent that such action is in accordance with the resident's plan of care. Further, § 483.20(d)(2)(ii) provides

that, to the extent practicable, each resident participates in preparing his or her own plan of care. Thus, while a facility cannot induce residents to refuse needed care, routine resident participation in developing and updating the care plan can enable the facility to ascertain any preferences residents themselves may have regarding services they do not wish to receive. When a resident refuses necessary services, and that refusal is documented in the plan of care, the facility is not obligated under the regulations (§ 483.25) to provide those services. In situations where a resident refuses a service, the facility must continue to meet the requirements of § 483.25 with respect to other services. We also suggest that in such situations, the facility assess the reasons for the resident's refusal, educate the resident as to the consequences of his or her refusal, and offer alternative treatment to alleviate those consequences.

We are making a technical correction to § 483.70, Physical Environment. In paragraph (a)(2), which concerns life safety from fire, we delete the phrase ", or in the case of a nursing facility (including a dually participating facility), the State survey agency", in order to make this provision consistent with section 1919(d)(2)(B) of the Act, which provides that only the Secretary can grant Life Safety code waivers. We are also making a technical correction to paragraph (d), Resident Rooms. In paragraph (d)(1)(v) we correct the certification date to March 31, 1992. As discussed in the preamble to the final rule (56 FR 48861), we are making this change to carry out our intention that this provision apply to facilities certified when these regulations are effective, i.e., on April 1, 1992.

We are making a technical correction to § 483.75, Administration. In paragraph (o), which concerns quality assessment and assurance, we add a new paragraph (o)(4) to specify that good faith attempts by the committee to identify and correct quality deficiencies will not be used as a basis for sanctions. In the preamble to the final rule (56 FR 48862), we stated that we were adding this language, but inadvertently omitted it from the regulations.

We are making a number of technical corrections in part 498, Appeals Procedures for Determinations that Affect Participation in the Medicare Program. We make a technical correction to substitute "ICF/MR" for "SNF" (Skilled Nursing Facility) and "ICF" (Intermediate Care Facility) in §§ 498.3(b) (Scope and Applicability, Initial Determinations by HCFA) and 498.5(j) (Appeal Rights for Medicaid SNFs and ICFs terminated by HCFA) to reflect the nomenclature required by the Omnibus Budget Reconciliation Act of 1987 (OBRA 87). We are also updating the statutory citation found in § 498.3(b)(8). Former section 1910(c) of the Act was redesignated as section 1910(b) by section 4212(e)(3)(C) of OBRA 87, but this change was inadvertently omitted from the regulations.

Waiver of Notice of Proposed Rulemaking and Delay of Effective Date

We ordinarily publish a general notice of proposed rulemaking in the **Federal Register** and invite prior public comment on a proposed rule. Final rules generally have a 30 day or longer prospective effective date. However, this final rule only makes typographical and a limited number of technical corrections to final rules published on September 26, 1991 (56 FR 48826), July 5, 1991 (56 FR 30696) and a final rule with comment published on February 2, 1989 (54 FR 5316). It would be impracticable, unnecessary and contrary to the public interest to publish a proposed rule and solicit comments since this rule is designed to conform the regulations to statutory provisions and other regulations already in effect. Similarly, it would serve no useful purpose to delay the effective date of corrections, since the rules they correct are already in effect. We, therefore, find good cause to waive notice of proposed rulemaking and our usual delay in the effective date.

List of Subjects

42 CFR Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 442

Grant programs-health, Health facilities, Health professions, Medicaid, Nursing homes, Reporting and recordkeeping requirements.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR Part 483

Grant programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

42 CFR Part 488

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 498

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

CHAPTER IV—HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR chapter IV is amended as follows:

A. Part 431 is amended as follows:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act, (42 U.S.C. 1302).

2. In subpart M, § 431.610(g), the introductory text is republished and paragraph (g)(1) is revised to read as follows:

Subpart M—Relations With Other Agencies

§ 431.610 Relations with standard-setting and survey agencies.

* * * * *

(g) *Responsibilities of survey agency.* The plan must provide that, in certifying skilled nursing and intermediate care facilities, the survey agency designated under paragraph (e) of this section will—(1) Review and evaluate medical and independent professional review team reports obtained under part 456 of this subchapter as they relate to health and safety requirements;

* * * * *

B. Part 442 is amended as follows:

PART 442—CONDITIONS FOR PAYMENT FOR NURSING FACILITY SERVICES AND FOR INTERMEDIATE CARE FACILITY SERVICES FOR THE MENTALLY RETARDED

1. The authority citation for part 442 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302), unless otherwise noted.

2. In part 442, we are making the following amendments:

(a) In § 442.1(a), the entries for sections 1905 (c) and (d) and 1913 are revised and a separate entry for section 1905(d) is added to read as follows:

§ 442.1 Basis and purpose.

* * * * *

Section 1905(c), definition of nursing facility; Section 1905(d), definition of intermediate care facility for the mentally retarded;

* * * * *

Section 1913, hospital providers of nursing facility services; and

* * * * *

(b) Section 442.13(c)(2) is revised to read as follows:

§ 442.13 Effective date of agreement.

* * * * *

(c) * * *

(2) The date on which a NF is found to meet the applicable requirements or an ICF/MR is found to meet all conditions of participation, and the facility submits an acceptable correction plan for lower level deficiencies, or an approvable waiver request, or both.

§ 442.40 [Amended]

(c) In § 442.40, paragraph (b)(1), "not been" is substituted for "not be".

§ 442.101 [Amended]

(d) In § 442.101, paragraph (c), "ICFs/MR.". is substituted for "ICF/MR.".

§ 442.105 [Amended]

(e) In § 442.105, paragraph (e) is removed.

§ 442.110 [Amended]

(f) In § 442.110, paragraph (a), the second sentence is removed.

C. Part 447 is amended as follows:

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In Part 447 we are making the following revisions:

§ 447.255 [Amended]

(a) In § 447.255, paragraph (a), the phrase "rate for each type of provider" is submitted for "rate for each type of provider".

§ 447.272 [Amended]

(b) In § 447.272, paragraph (a), "(ICFs/MR))" is substituted for "(ICFs/MR)".

SUBCHAPTER E—STANDARDS AND CERTIFICATION

D. Part 483 is amended as follows:

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

1. The authority citation for part 483 is revised to read as follows:

Authority: Sec. 1102, 1819(a)–(f), 1861(j) and (1), 1863, 1871, 1902(a)(28), 1905(a), (c) and (d), and 1919(a)–(f) of the Social Security Act (42 U.S.C. 1302, 1395(i)(3)(a)–(f), 1395x (j) and (l) 1395hh, 1395z, 1396(a)(a)(28), and 1396d (c) and (d), and 1396r(a)–(f), unless otherwise noted.

§ 483.1 [Amended]

2. In § 483.1, paragraph (a)(1), the phrase "Sections 1819 (a), (b), (c), and (d) of the Act" is substituted for "Sections of the Act 1819(a), (b), (c), and (d)".

§ 483.5 [Amended]

3. In § 483.5, the phrase "sections 1819 or 1919" is substituted for "sections 1819 and 1919"; the phrase "or § 440.150" is removed and "§ 440.150" is substituted for "§ 440.150(c)".

§ 483.10 [Amended]

4. Section 483.10 is amended as follows:

(a) In paragraph (b)(2)(i), the phrase "including current clinical records within 24 hours (excluding weekends and holidays); and" is substituted for "including clinical records within 24 hours; and".

(b) In paragraph (c)(4)(ii), the word "and" is added before the phrase "on request" so that this paragraph reads as follows: "The individual financial record must be available through quarterly statements and on request to the resident or his or her legal representative."

(c) In paragraph (g)(1), the phrase "The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability; and" is substituted for the phrase "The results must be made available for examination by the facility in a place readily accessible to residents; and".

(d) In paragraph (g)(2), "contract" should read "contact".

(e) In paragraph (j)(1)(iv), "State" should read "State".

(f) In paragraph (j)(2), "anytime." should read "any time.".

(g) In paragraph (m), "arrangement" should read "arrangement.".

(h) In paragraph (o)(1), "facility" should be changed to "institution" every place it appears.

(i) In paragraph (o)(1)(ii), "If a resident" should read "A resident".

(j) In paragraph (o)(2), "Medicaid benefits" should read "Medicare or Medicaid benefits".

§ 483.12 [Amended]

5. Section 483.12 is amended as follows:

(a) In paragraph (a)(5)(D), "(a)(2)(ii)" should read "(a)(2)(i)".

(b) In paragraph (a)(6), "For nursing facilities, the written notice" should read "The written notice".

(c) In paragraph (d)(1)(ii), "Medicare benefits" should read "Medicare or Medicaid benefits".

§ 483.13 [Amended]

6. Section 483.13 is amended as follows:

(a) In paragraph (c)(1)(ii)(A), "mistreating individuals" should read "mistreating residents".

(b) In paragraph (c)(1)(iii), "other NF staff" should read "other facility staff".

§ 483.15 [Amended]

7. Section 483.15 is amended as follows:

(a) In paragraph (a), "individuality" should read "individuality.".

(b) In paragraph (f)(2)(i), "who is—" should read "who—".

(c) In paragraph (f)(2)(i)(A), "Licensed" should read "Is licensed".

(d) In paragraph (f)(2)(i)(B), "Eligible" should read "Is eligible".

(e) In paragraph (f)(2)(i)(B), "on Ocotber 1, 1990" should read "on or after October 1, 1990".

§ 483.20 [Amended]

8. Section 483.20 is amended by:

(a) Substituting in paragraph (e) the phrase "anticipates discharge," for "anticipates discharges".

(b) Substituting in paragraph (f)(1)(i)(B), the phrase "whether the individual requires specialized services; or" for "whether specialized services the individual requires active treatment for mental illness; or".

(c) Substituting in paragraph (f)(1)(ii)(B), "specialized services" for "active treatment".

(d) Revising paragraph (d)(1) to read as follows:

§ 483.20 Resident assessment.

* * * * *

(d) *Comprehensive care plans.* (1) The facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment. The care plan must describer the following—

(i) The services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under § 483.25; and

(ii) Any services that would otherwise be required under § 483.25 but are not provided due to the resident's exercise of rights under § 483.10, including the

right to refuse treatment under § 483.10(b)(4).

* * * * *

§ 483.25 [Amended]

9. Section 483.25 is amended as follows:

(a) In paragraph (g)(2), "feeding function." should read "eating skills.".

(b) In paragraph (1), "*Unnecessary drug.*" should read "*Unnecessary drugs.*".

§ 483.30 [Amended]

10. In § 483.30, paragraph (d)(1)(iv), "Americans" is substituted for "American".

§ 483.45 [Amended]

11. Section 483.45 is amended as follows:

(a) In paragraph (a), "and health rehabilitative services" should read "and mental health rehabilitative services".

(b) In paragraph (a)(2), "§ 483.75(j) of this part)" should read "§ 483.75(h) of this part)".

§ 483.60 [Amended]

12. In § 483.60, paragraph (d), "and include" is substituted for "and including".

§ 483.65 [Amended]

13. In § 483.65, paragraph (c), "infection." is substituted for "infection".

§ 483.70 [Amended]

14. Section 483.70 is amended as follows:

(a) In paragraph (a)(1)(ii), "wavers" should read "waivers".

(b) In paragraph (a)(2), after "HCFA" remove ", or in the case of a nursing facility (including a dually participating facility), the State survey agency". As corrected, § 483.70(a)(2) reads as follows: "After consideration of State survey agency findings, HCFA may waive specific provisions of the Life Safety Code which, if rigidly applied would result in unreasonable hardship upon the facility, but only if the waiver does not adversely affect the health and safety of residents or personnel."

(c) In paragraph (d)(1)(v), "March 31, 1992" is substituted for "September 30, 1990".

§ 483.75 [Amended]

15. Section 483.75 is amended as follows:

(a) In paragraph (j)(2)(i), "attending physicians;" should read "attending physician;".

(b) In paragraph (j)(2)(iii), "needs assistance." should read "needs assistance; and".

(c) In § 483.75, a new paragraph (o)(4) is added to read as follows:

§ 483.75 Administration.

* * * * *

(o) * * *

(4) Good faith attempts by the committee to identify and correct quality deficiencies will not be used as a basis for sanctions.

* * * * *

16. In § 483.410, a new paragraph (e) is added to read as follows:

§ 483.410 Condition of participation: Governing body and management.

* * * * *

(e) *Standard: Licensure.* The facility must be licensed under applicable State and local law.

E. Part 488 is amended as follows:

PART 488—SURVEY AND CERTIFICATION PROCEDURES

1. The authority citation for part 488 is revised to read follows:

Authority: Secs. 1102, 1814, 1861, 1865, 1866, 1871, 1880, 1881, 1883, and 1913 of the Social Security Act (42 U.S.C. 1302, 1395f, 1395x, 1395bb, 1395cc, 1395hh, 1395qq, 1395rr, 1395tt, and 1396l).

§ 488.56 [Amended]

2. Section 488.56 is amended as follows:

(a) In paragraph (a) introductory text, the reference "483.20" should read "483.30".

(b) In paragraphs (b) introductory text and (b)(2) the reference "§ 488.75(k)" should read "§ 483.75(i)".

F. Part 498 is amended as follows:

PART 498—APPEALS PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM

1. The authority citation for part 498 continues to read as follows.

Authority: Secs. 205(a), 1102, 1869(c), 1871, and 1872 of the Social Security Act (42 U.S.C. 405(a), 1302, 1395ff(c), 1395hh, and 1395ii), unless otherwise noted.

2. The part heading is revised to read as follows:

PART 498—APPEALS PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM

§ 498.3 [Amended]

3. In § 498.3, paragraph (b)(8), "ICF/MR" is substituted for "SNF or ICF" and "1910(c)' should read "1910(b)".

§ 498.5 [Amended]

4. In § 498.5, paragraph (j), "ICF/MR" is substituted for the phrase "SNF or ICF" every place it appears.

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare Hospital Insurance, No. 93.778, Medical Assistance Program)

Dated: May 12, 1992.

William Toby,

Acting Deputy Administrator, Health Care Financing Administration.

Approved: June 5, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 92-22313 Filed 9-22-92; 8:45 am]

BILLING CODE 4120-01-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1321

[Ex Parte No. MC-208]

Nonoperating Motor Carriers—Collection of Undercharges

AGENCY: Interstate Commerce Commission.

ACTION: Final rules; delay of effective date.

SUMMARY: To facilitate consideration of various petitions for administrative stay pending judicial review, the Commission on September 18, 1992, extended the date at which the regulations promulgated in this proceeding will become effective until October 8, 1992. The rules were previously to become effective on September 23, 1992. The final rules were published on September 8, 1992 at 57 FR 40857.

EFFECTIVE DATE: The final rules are effective on October 8, 1992.

FOR FURTHER INFORMATION CONTACT: Richard Felder, (202) 927-5610, (TDD for hearing impaired: (202) 927-5721).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423 or call (202) 289-4357.

Authority: 49 U.S.C. 10322(g).

Decided: September 18, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-23084 Filed 9-22-92; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 672 and 675

[Docket No. 920531-2221]

RIN 0648-AD76

Groundfish of the Gulf of Alaska, and Groundfish Fishery of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues final regulations to implement Amendment 19 to the Fishery Management Plan (FMP) for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI) and Amendment 24 to the FMP for Groundfish of the Gulf of Alaska (GOA). These regulations implement FMP amendments which establish 1992 Pacific halibut bycatch limits for trawl and non-trawl gear in the BSAI and authorize regulatory amendments that would provide for inseason time/area closures to further reduce prohibited species bycatch rates. In addition, existing regulations are amended to revise the management and monitoring of prohibited species bycatch amounts and the vessel incentive program to reduce prohibited species bycatch rates. These actions are intended to promote management and conservation of groundfish and other fish resources and to further the goals and objectives contained in the FMPs that govern these fisheries.

EFFECTIVE DATES: Effective September 30, 1992, except for changes to regulations at §§ 672.26 and 675.26, which will become effective at 12 noon, Alaska local time, January 20, 1993. Regulations at § 675.21(a)(5) are suspended effective September 30, 1992. This suspension will terminate December 31, 1992.

ADDRESSES: Copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510 (telephone 907-271-2809).

FOR FURTHER INFORMATION CONTACT: Susan J. Salveson, Fisheries Management Division, Alaska Region, NMFS, 907-586-7230.

SUPPLEMENTARY INFORMATION:

Background

The domestic and foreign groundfish fisheries in the exclusive economic zone (EEZ) off Alaska are managed by the Secretary of Commerce (Secretary) in accordance with the BSAI and GOA FMPs prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMPs are implemented by regulations for the foreign fishery at 50 CFR part 611 and for the U.S. fishery at 50 CFR parts 672 and 675. General regulations that also pertain to U.S. fisheries are implemented at 50 CFR part 620.

During its December 3–9, 1991, meeting, the Council adopted Amendments 19/24 for review by the Secretary under section 304(b) of the Magnuson Act. Section 304(b) requires the Secretary or her designee to approve, disapprove, or partially disapprove FMPs or FMP amendments any time after the 60th day from receipt and before the close of the 95th day following receipt. During its December 1991 meeting, the Council also adopted for Secretarial review regulatory amendments that would revise the management and monitoring of prohibited species bycatch and the vessel incentive program to reduce prohibited species bycatch rates. A notice of availability of Amendments 19/24 was published in the Federal Register (57 FR 17879, April 28, 1992). It invited review of, and comment on, the amendments until June 22, 1992. A notice of proposed rulemaking was published in the Federal Register on May 29, 1992 (57 FR 22695). It invited comments on the proposed rule implementing Amendments 19 and 24 and associated regulatory amendments. The comment period ended July 13, 1992. Twenty-one letters of comments were received. They are summarized and responded to below in the "Response to comments" section.

The final rule implementing Amendments 19 and 24 will:

(1) For 1992, reduce the Pacific halibut prohibited species catch (PSC) limit established for BSAI trawl gear from 5,333 metric tons (mt) to 5,033 mt, but retain the primary halibut PSC limit at 4,400 mt;

(2) For 1992, establish a 750 mt Pacific halibut bycatch mortality limit for BSAI fixed gear; and

(3) Establish FMP authority to develop and implement regulatory amendments that provide for time/area closures to reduce prohibited species bycatch rates.

In addition to the above FMP amendments, the following amendments to current regulations are implemented:

(1) Revise BSAI fishery definitions for purposes of monitoring fishery specific bycatch allowances and assigning vessels to fisheries for purposes of the vessel incentive program;

(2) Revise the definition and accountability of BSAI trawl fishery categories that are eligible to receive prohibited species bycatch allowances;

(3) Expand the vessel incentive program to address halibut bycatch rates in all trawl fisheries;

(4) Delay the season opening date of the BSAI and GOA groundfish trawl fisheries to January 20 of each fishing year to reduce chinook salmon and halibut bycatch rates;

(5) Further delay the season opening date of the GOA trawl rockfish fishery to the beginning of the weekly reporting period closest to July 1 to reduce halibut and chinook salmon bycatch rates; and

(6) Change directed fishing standards to further limit halibut bycatch associated with bottom trawl fisheries.

A full description of these measures and their justification is presented in the May 29, 1992, notice of proposed rulemaking (57 FR 22695). The prohibited species bycatch allowances implemented for the 1992 BSAI trawl fisheries under this action are listed in Table 1. Table 1 includes the adjustment to the 1992 Pacific herring bycatch limit and associated fishery apportionments that were implemented on August 3, 1992 (57 FR 35489, August 10, 1992). The 1992 seasonal apportionments of the 5,033 mt halibut bycatch limit established for the BSAI trawl fisheries are listed in Table 2.

For purposes of monitoring the 750 mt halibut PSC limit for non-trawl gear, the Director, Alaska Region, NMFS (Regional Director), will use observed halibut bycatch rates and reported groundfish catch to project when the 750 mt mortality limit is reached. For purposes of this rule, non-trawl gear means hook-and-line, jig, and groundfish pot gear. Based on information contained in the final 1992 Stock Assessment and Fishery Evaluation (SAFE) report, dated November 1991, the assumed mortality rate of Pacific halibut that are caught as bycatch in the hook-and-line and jig gear fisheries is 16 percent. The assumed mortality rate of halibut incidentally taken in the groundfish pot gear fisheries is 10 percent. Staff of the International Pacific Halibut Commission (IPHC) have recently asserted that the assumed halibut mortality rate in the hook-and-line fisheries may be further reduced by

50 percent if halibut are not brought on board a vessel to remove the hook but are released by cutting the gangion line. Therefore, the Regional Director will assume an 8 percent mortality rate for those halibut that are observed by NMFS certified observers to be released using this method. Based on these mortality rates, the 750 mt halibut mortality limit established by Amendment 19 has been reached.

The Council recommended that the 5,033 mt halibut PSC limit for trawl gear and several of the regulatory measures listed above be implemented under emergency interim rulemaking during the period the Secretary was reviewing Amendments 19/24 and associated regulatory amendments. The first emergency rule was implemented on March 30, 1992 (57 FR 11433, April 3, 1992), and was extended for an additional period of 90 days (57 FR 29223, July 1, 1992). A correction to the emergency rule was published on April 22, 1992 (57 FR 14667). A technical amendment to the emergency rule was published May 20, 1992 (57 FR 21355). A second emergency rule was implemented May 21, 1992 (57 FR 22182, May 27, 1992) to respond to unexpectedly high bycatch amounts in the BSAI pollock fishery and to maintain halibut bycatch amounts within the halibut bycatch limit established for the 1992 trawl fisheries.

The Secretary has reviewed each of the measures under Amendments 19 and 24 and associated regulatory amendments and the reasons for them. She has determined that each measure is necessary for conservation and management of the groundfish fisheries off Alaska and has approved them.

The effective date of the amendments to regulations that implement the vessel incentive program (§§ 672.26 and 675.26) is delayed until January 20, 1993, when the 1993 trawl season opens under §§ 672.23 and 675.23. The Secretary has delayed the effective date of the revised incentive program until such time that standard product recovery rates (PRRs) are published in the Federal Register. For the purposes of the vessel incentive program, standard PRRs must be promulgated by regulations to support amended fishery definitions that was based on retained catch composition rather than observed total catch composition. Standard PRRs will be used to estimate catch weights of retained species. Based on this information, vessels will be assigned to vessel incentive program fisheries under the revised fishery definitions at §§ 672.26(b) and 675.26(b) to facilitate the enforcement of the incentive program and the prosecution of violation. At this time, NMFS anticipates that a final rule implementing standard PRRs will be effective by the start of the 1993 trawl season on January 20, 1993. Until then, the current vessel incentive program will remain in place.

Numerous trawl fishery closures have been implemented under the March 30, 1992, emergency rule (57 FR 11433, April 3, 1992), as corrected and amended (57 FR 14667, April 22, 1992 and 57 FR 21355, May 20, 1992). These closures became effective upon the attainment of fishery prohibited species bycatch allowances specified under the emergency rule and will remain in effect under the same bycatch allowances specified under the final rule. **Federal Register** citations for each of the closures implemented under the emergency rule are as follows: 57 FR 18093, April 29, 1992; 57 FR 20207, May 12, 1992; 57 FR 20655, May 14, 1992; 57 FR 23347, June 3, 1992; 57 FR 24559, June 10, 1992; 57 FR 29656, July 6, 1992; 57 FR 29806, July 7, 1992; 57 FR 31129, July 14, 1992; 57 FR 35489, August 10, 1992).

When effective, the final rule implementing Amendments 19/24 and associated regulatory amendments will supersede the March 30, 1992, emergency rule, which is effective through September 30, 1992.

Changes in the Final Rule From the Proposed Rule

This final rule includes changes from the proposed rule. These changes are described as follows:

1. In § 672.20(f), references to joint venture processing (JVP) apportionments of halibut bycatch limits are no longer applicable to the groundfish fishery and are deleted. Also, the term "seasonal allocation" of halibut bycatch allowances is changed to "seasonal apportionment" for regulatory consistency of terms. Technical amendments to implement these editorial changes are found at § 672.20 (f)(1)(i), (f)(1) (iii) through (v), (f)(2)(ii), (f)(2)(iii), and (f)(2)(v).

2. The directed fishing standard for GOA rockfish at § 672.20(g)(2) is changed to expand its application to all gear types and to clarify that this standard excludes demersal shelf rockfish species that are addressed under existing directed fishing standards at § 672.20(g)(1)(ii) and (g)(2)(ii).

3. Editorial changes are made to directed fishing standards at §§ 672.20(g)(3) and 675.20(h)(1) to clarify that these standards apply to groundfish species caught with pelagic trawl gear rather than to vessels using pelagic trawl gear.

4. The definition of the midwater pollock fishery for purposes of the vessel incentive program at 50 CFR 672.26(b) is changed to clarify that the halibut bycatch rate standard specified for the midwater pollock fishery will become effective only after directed fishing is closed for pollock by vessels using trawl gear other than pelagic trawl gear. This intent was set forth in the preamble to the proposed rule and was inadvertently deleted from the proposed rule itself.

5. The definition of trawl fisheries included under the BSAI vessel incentive program at 50 CFR 675.26(b) is revised by removing reference to fishery definitions at § 675.21(b) and adding revised fishery definitions that aggregate fisheries with similar halibut and red king crab bycatch rates. The purpose of this change is to provide more sampled hauls per vessel to support statistically valid estimates of monthly bycatch rates relative to the expanded incentive program.

Public comment on the aggregation of BSAI trawl fisheries for purposes of the vessel incentive program was specifically solicited in the preamble to the proposed rule. During its June 24–28, 1992, meeting, the Council commented that the 7 incentive program fisheries set forth under the proposed rule should be reduced to 4 fisheries (midwater pollock, yellowfin sole, bottom pollock, and other trawl fisheries), and that the final rule implementing the revised incentive program should be changed accordingly. Additional public comment on the proposed rule further supported this change. Without this change, implementation of the expanded incentive program would be less effective.

6. Consistent with the above change, 50 CFR 675.26(a)(2)(ii)(A) and (B) are revised to refer to appropriate fishery definitions for purposes of the incentive program.

7. In § 675.26(d)(3)(i)(C), reference to chinook salmon bycatch rates was erroneously included in the proposed rule and is deleted in the final rule because this species is not addressed under the current vessel incentive program.

8. A new paragraph is added to 50 CFR 672.7 and 675.7 to clarify and facilitate the enforcement of directed fishing closures that are implemented when either directed fishing allowances or prohibited species bycatch allowances are reached. When a directed fishery closure is implemented under existing regulations, fishing operations are allowed to continue if retained amounts of groundfish do not

exceed specified bycatch levels. The ability of vessels to continue to fish under directed fishing closures makes these closures difficult to monitor and enforce except by intrusive and costly at-sea boarding or by observing shoreside landings of catch. Regulations are clarified so that when directed fishing in an area for all groundfish species by vessels using a specified gear type is closed, fishing for groundfish with that gear type will also be prohibited in that area. Under this prohibition, no gear of the affected type could be deployed by a Federally permitted vessel in the area, thus facilitating effective and efficient aerial surveillance of fishery closures. Exceptions to this prohibition are made for vessels participating in the Pacific halibut fishery using hook-and-line gear.

9. The values stated in Table 1 under the section for Pacific herring prohibited species bycatch allowances for midwater pollock and yellowfin sole in the BSAI were increased from 573 and 134 mt to 1,668 and 391 mt, respectively, as a result of an inseason Pacific herring bycatch management measure (57 FR 35490, August 10, 1992).

Response to Comments

Twenty-one letters of comments were received during the comment period. Fifteen of these letters addressed the 750 mt halibut bycatch mortality limit proposed for non-trawl gear. Four letters were submitted by government agencies that expressed no comment on the proposed rule. Two letters were submitted on proposed changes to the vessel incentive program and enhancement of enforcement of directed fishing closures. The Council also commented on these last two issues during its June 24–28, 1992, meeting. Comments are summarized and responded to below:

Comment 1: A 750 mt halibut bycatch mortality limit is too constraining to non-trawl gear fisheries during the current developmental phase of these fisheries. Halibut bycatch rates and handling mortality will decrease with fleet experience and with incorporation of "sanctioned" methods for decreasing handling mortality. Domestic trawl fisheries were able to develop in the early 1980's without the encumbrance of burdensome management measures to control halibut bycatch. Management of the developing non-trawl fisheries should be provided the same latitude as that provided for the trawl fisheries.

Response: The 750 mt halibut bycatch mortality limit is only implemented for 1992. This limit was adopted by the Council under the assumption that it would not significantly constrain the hook-and-line fishery for Pacific cod during 1992 based on bycatch rates experienced by the hook-and-line fishery during 1991. The Council further intended that actual bycatch needs experienced by the 1992 fisheries would provide guidance in the development of bycatch management measures implemented for 1993 and beyond. Although recent halibut bycatch rates experienced in the 1992 hook-and-line fishery for Pacific cod are higher than expected, the initial total allowable catch (TAC) of Pacific cod will be harvested prior to the effective date of the 750 mt mortality limit. The harvest of Pacific cod by the non-trawl fisheries has significantly increased during the past 3 years due to premature closures of the Pacific cod trawl fishery that resulted from the attainment of trawl bycatch allowances of prohibited species.

NMFS anticipates that the 1992 harvest of Pacific cod by non-trawl gear will be about 130 percent of the total 1991 non-trawl harvest of this species. The Council has also initiated analyses of management measures that would provide the authority to allocate preferentially Pacific cod to non-trawl gear fisheries. If implemented, these measures would provide additional support for the developing non-trawl fisheries in a manner that approaches that provided to domestic trawl operations in the early 1980's.

Comment 2: The Amendment 19 halibut bycatch mortality limit for non-trawl gear, 750 mt, is arbitrary and unfair. The amount was not tied to groundfish harvest projections for 1992, does not support the current fleet groundfish harvest needs, and does not allow the non-trawl harvest of Pacific cod to increase.

Response: The non-trawl halibut limit, 750 mt, is neither arbitrary nor unfair. It was derived from the amount of halibut bycatch mortality accrued by non-trawl gear in 1991, plus an additional amount which would allow a 1992 harvest of Pacific cod at 150 percent of 1991 levels, at similar bycatch rates. Some growth of the BSAI non-trawl fleet and associated groundfish harvest was anticipated, although the magnitude of increase, particularly of the Pacific cod fishery, could not be quantified with any certainty. As mentioned in the response to Comment 1, constraints to the non-trawl fisheries arise primarily from the competition with the trawl fleet for the available amounts of Pacific cod under TAC limitations, not 1992 halibut bycatch restrictions. Amendment 19 does not constrain future expansion of the non-trawl fleet or associated groundfish harvest because the halibut limit on non-trawl gear is only implemented for 1992.

Comment 3: The 750 mt halibut bycatch mortality limit proposed for non-trawl gear is too low, and is unduly restrictive. The Council did not intend the 1992 halibut bycatch mortality limit to constrain non-trawl fisheries. Non-trawl fisheries are unable to harvest available Pacific cod TAC with a 750 mt halibut mortality limit.

Response: The 750 mt mortality limit established for the 1992 non-trawl fisheries will be reached because segments of the hook-and-line fleet experienced bycatch rates that were much higher than rates experienced in 1991. See also responses to Comments 1 and 2.

Prohibited species bycatch limits have been implemented to control the take of halibut, crabs, and herring in groundfish fisheries. The Council has the task of allocating bycatch limits among competing fisheries, with the understanding that such policies might constrain certain gears or target fisheries, but that bycatch amounts cannot be limited under existing management regimes without such constraints. The Council has also made a commitment to further reduce the bycatch mortality of halibut in all groundfish fisheries.

Comment 4: National standard 1 mandates the achievement of optimum yield (OY). The judicious use of longline gear and improved halibut handling techniques offer the only practical conservation-oriented method of achieving the BSAI Pacific cod OY in 1992. A 750 mt bycatch mortality limit for the 1992 longline fishery will constrain the ability of the longline fleet to take the Pacific cod OY.

Response: The 750 mt bycatch mortality limit established for non-trawl gear in 1992 is consistent with national standard 1. This standard requires that conservation and management measures prevent overfishing while achieving, on a continuing basis, the OY from each fishery for the U.S. fishing industry. NMFS anticipates that the 1992 Pacific cod fishery will harvest the initial TAC by late August 1992, prior to the effective date of regulations implementing the 750 mt mortality limit. Therefore, with respect to Pacific cod the Secretary finds that regulations implementing the 750 mt bycatch limit, by themselves, will not jeopardize achievement of the OY.

Comment 5: Imposition of the 750 mt bycatch mortality limit for the 1992 non-trawl fisheries will cause a net economic loss to the nation. The value of halibut as bycatch mortality in non-trawl

groundfish fisheries is much greater than the value of halibut taken in a directed halibut fishery, and also greater than the same differential calculated for trawl gear.

Response: The United States has assumed international obligations to support the directed Pacific halibut fishery. These obligations are met, in part, by the implementation and enforcement of halibut bycatch restrictions in the Alaska groundfish fisheries. The EA/RIR/FRFA developed in support of Amendment 19 acknowledges that prohibited species bycatch limits are costly to the Alaska groundfish industry. The Council recognized these costs when it adopted the halibut bycatch limits implemented under Amendment 19. The Secretary also acknowledges that the halibut bycatch limits established for the Alaska groundfish fisheries are an expensive way to control halibut bycatch mortality in these fisheries. She has determined, however, that the bycatch limits implemented under Amendment 19 and the resulting allocation of Pacific halibut among groundfish fishermen using trawl and non-trawl gear, and among halibut fishermen, are consistent with the national standards and with international agreements to support the traditional setline halibut fishery.

Comment 6: Implementing a halibut bycatch mortality limit for non-trawl gear in the BSAI will cause serious economic disruption to a segment of the groundfish industry. Closure of the hook-and-line fishery for Pacific cod under a halibut bycatch mortality limit will impose serious economic hardship for individuals and companies who recently entered the BSAI Pacific cod fishery. Additional economic hardship will be incurred by individuals who made investments in harvesting, processing, or marketing operations, and by support industries depending on a stable and growing fishery, including overseas markets and an emerging squid fishery that supplies bait for the hook-and-line cod fishery.

Response: One of the Council's stated management objectives for the BSAI groundfish fishery is to "minimize the impact of groundfish fisheries on prohibited species and continue the rebuilding of the Pacific halibut resource." Consistent with this objective, numerous management measures have been implemented to control prohibited species bycatch amounts with the understanding that such actions might be constraining to the groundfish industry. The non-trawl fishery for BSAI groundfish, particularly for Pacific cod, has entered a growth phase at a time when the Council is considering action to restrict additional entry into what is widely considered to be a substantially overcapitalized fishery. At present, Pacific cod is available to the non-trawl gear fleet because of prohibited species bycatch controls placed on the established trawl fishery. Open access fisheries offer no guarantee of available groundfish TAC, of prohibited species bycatch to support fishing operations, or of freedom from competition from other harvesters and suppliers of similar products. A decision to enter the industry at any given time places an investment risk on each individual fishing, processing, marketing, or support operation.

Comment 7: The 750 mt limit is discriminatory against the non-trawl groundfish fleet for the following reasons: (1) trawl gear fisheries have a disproportionate share of halibut mortality; (2) trawl gear fisheries have many target species options and the ability to "self allocate" halibut among targets to mitigate economic effects on the fleet, whereas the non-trawl gear fisheries, which are primarily dependent on Pacific cod, have a single bycatch allowance; and (3) trawl gear fisheries are allowed to accrue halibut bycatch designated limits, but the non-trawl gear fisheries are not.

Response: The 750 mt bycatch mortality limit is not discriminatory. Allocations of groundfish TAC amounts and supporting prohibited species bycatch limits are established through the Council process after consultation with scientists, industry, and the general public. Under this process, the 1992 BSAI halibut bycatch limit established for trawl gear fisheries was reduced from 5,333 mt to 5,033 mt for 1992. This reduction was partially intended to provide amounts of halibut bycatch mortality for non-trawl fisheries under Amendment 19. The 750 mt bycatch mortality limit for non-trawl gear fisheries established under this amendment provides substantially more halibut for non-trawl fisheries than needed for these fisheries the previous year. Conversely, the historical magnitude of groundfish harvest in established trawl fisheries warrants the larger share of available bycatch.

Most vessels using non-trawl gear to fish for BSAI groundfish target on Pacific cod, although sablefish, Greenland turbot, and arrowtooth flounder have also been harvested by non-trawl gear during recent years. The 1992 bycatch mortality limit established for non-trawl gear under Amendment 19 is not apportioned among different non-trawl gear fisheries. The Council did not recommend separate bycatch allowances for the 1992 non-trawl gear fisheries, because vessels were expected to continue to fish predominantly for Pacific cod. At its June 24–28, 1992, meeting, however, the Council adopted FMP authority to exempt specified non-trawl gear fisheries from halibut bycatch restrictions under the criteria set forth under proposed Amendment 21 to the BSAI FMP. If approved by the Secretary, this amendment would provide the authority to establish separate halibut bycatch allowances for the non-trawl fisheries and exempt specified non-trawl gear fisheries from bycatch restrictions in 1993 and beyond.

Although regulatory provisions are made to exempt the pelagic trawl pollock fishery from halibut and crab bycatch restrictions to account for the fishery's low bycatch rates, vessels participating in this fishery must not exceed a 0.1 percent halibut bycatch rate standard under the vessel incentive program.

Comment 8: The 16 percent mortality assumption for halibut bycatch in hook-and-line fisheries is too high. Handling mortality is greatly reduced when fish are released by cutting gangions or by shaking or twisting fish off hooks. Many vessels have been using such practices in 1992, and estimates of halibut bycatch mortality should be adjusted downward accordingly.

Response: The IPHC has recently asserted that assumed mortality assumptions for halibut taken in the hook-and-line fisheries may be reduced to 8 percent if halibut are not brought on board a vessel to remove the hook but instead, fish are released by cutting the gangion line. In response, NMFS has initiated the collection of observer data that allows for an 8 percent mortality assessment for those halibut observed to be released by cutting of gangions. A 16 percent assumption is retained for unobserved halibut or halibut observed to be released by other methods. NMFS will continue to work with the IPHC in assessing halibut mortality and deriving the best estimate available for assumed mortality rates in the hook-and-line fishery. Consistent, observed action taken by the hook-and-line fleet to reduce halibut handling mortality may be reflected in future downward adjustments of assumed mortality rates.

Comment 9: Halibut which are not brought on board a vessel and which are released by cutting of gangions or by carefully removing the hook should not be considered as bycatch.

Response: As noted in the response to Comment 8, NMFS will adjust mortality

assumptions for halibut observed to be released by cutting of gangions. Other methods of releasing halibut are observed, but vary too much in technique and accompanying mortality for consistent use in inseason mortality adjustments. NMFS will continue to monitor the amount of all halibut taken in the non-trawl fisheries, not just those halibut brought on board a vessel. Appropriate mortality assumptions will be applied against estimated bycatch amounts and the hook-and-line fleet will benefit from taking action to reduce handling mortality by cutting gangions.

Comment 10: The proposed changes to the vessel incentive program for the BSAI trawl fisheries should be revised so that bycatch rate standards are specified for the following three fisheries: yellowfin sole, midwater trawl pollock, and bottom trawl pollock. A global default standard should be specified for all other trawl fisheries. Assignment of vessels to these 4 fishery categories should be based on retained catch composition.

Response: For reasons discussed under "Changes in the final rule from the proposed rule," the Secretary has approved changes in the final rule that will establish four trawl fishery categories for purposes of the expanded vessel incentive program. The intent of this change is to provide sufficient numbers of sampled hauls to provide statistically reliable information about each vessel's monthly bycatch rate. As stated in the preamble to the proposed rule, NMFS recognizes the importance of using retained catch to assign vessels to fishery categories under the incentive program. Effective enforcement of bycatch rates calculated from retained catch will require that standard PRRs be established to calculate round weight equivalents of retained catch. Therefore, NMFS intends to delay the effective date of the expanded vessel incentive program until such time that standard product recovery rates are published in the Federal Register. NMFS anticipates that a final rule will be effective by the start of the 1993 trawl season on January 20.

Comment 11: Enforcement efforts require that fishing regulations facilitate investigations of fishing violations using methods which are cost-effective and minimally intrusive to fishing operations. Prohibiting fishing with a gear type and in an area for which all directed fisheries are closed would allow simplified monitoring and enforcement of fishing activity using aerial surveillance.

Reponse: The Secretary concurs. As described under "Changes in the final rule from the proposed rule," the intent of this comment will be implemented under §§ 672.7 and 675.7 of the final rule.

Comment 12: Prohibiting all fishing with a gear type in an area for which all directed fisheries are closed could preclude non-groundfish fisheries, such as those for shrimp and saffron cod, which might use that gear type in that area.

Response: At present, the only significant non-groundfish fishery which might be adversely affected by a prohibition of groundfish gear deployment in an area is the hook-and-line fishery for Pacific halibut. Therefore, the final rule exempts this fishery from such closures under §§ 672.2 and 675.7. Nonetheless, the Secretary concurs that fishermen using trawl, hook-and-line, or groundfish pot gear to participate in other non-groundfish fisheries could be prevented from doing so if the use of that gear is prohibited in an area to support directed fishing closures for groundfish. The Secretary, however, has determined that this clarification of directed fishing closures is necessary to simplify and reduce the burden to industry of surveillance and enforcement of groundfish fishery regulations. If required in the future, additional regulatory amendments may be implemented to provide exemptions to other non-groundfish fisheries. A proposed rule is in preparation which will provide trawl gear test areas for use during periods when the deployment of trawl gear may be prohibited.

Classification

NMFS determined that Amendments 19/24 and associated regulatory amendments are necessary for the conservation and management of the groundfish fisheries off Alaska. This final rule implementing Amendments 19/24 is published under section 305(a)(1) of the Magnuson Act that requires the Secretary to publish regulations that are necessary to carry out a plan or plan amendment. The Secretary has determined that Amendments 19/24 and associated regulatory amendments are consistent with the national standards, other provisions of the Magnuson Act, and other applicable law.

NMFS has determined that delaying the effectiveness of this final rule for the entire 30 days under the Administrative Procedure Act, 5 U.S.C. 552(d), is impracticable and contrary to the public interest in orderly conduct of the fisheries in the EEZ. This rule implements regulations and associated regulatory amendments to supersede the March 30, 1992, emergency rule, as corrected and amended (57 FR 14667, April 22, 1992 and 57 FR 21355, May 20, 1992), which is effective through September 30, 1992. Without implementing regulations in place, NMFS has determined that the same fishery conservation and management problem that Amendment 19/24 was intended to resolve, would occur. Therefore, NMFS is waiving a portion of the 30-day delayed effectiveness period for this final rule to correspond with the expiration of the emergency rule.

The Council prepared an EA for Amendments 19/24 and associated regulatory amendments. The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), found that no significant impact on the quality of the human environment will result from this rule. A copy of the EA may be obtained from the Council (See **ADDRESSES**).

NMFS has determined that none of the management measures implemented under the final rule would adversely affect endangered or threatened species. Therefore, formal consultation pursuant to section 7 of the Endangered Species Act is not required for the implementation of this rule.

The Assistant Administrator determined that this rule is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. This determination is based on the EA/RIR/FRFA prepared by the Council. A copy of the EA/RIR/FRFA may be obtained from the Council (See **ADDRESSES**).

The Assistant Administrator concluded that this rule will have significant effects on small entities. These effects have been discussed in the EA/RIR/FRFA, a copy of which may be obtained from the Council (See **ADDRESSES**).

This rule contains no collection-of-information requirements for purposes of the Paperwork Reduction Act.

The Council determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management program of the State of Alaska. This determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act. Consistency is automatically inferred, because the appropriate State agency did not reply within the statutory time period.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

List of Subjects in 50 CFR Parts 672 and 675

Fisheries, Reporting and recordkeeping requirements.

Dated: September 16, 1992.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

Note: Tables 1 and 2 will not appear in the Code of Federal Regulations.

TABLE 1.—1992 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL FISHERIES

Fisheries	Zone 1	Zone 2	Zones 1+2H	BSAI-wide
Yellowfin sole	75,000			
Rcksol/oth. flat [1]	85,000			
Turb/arrow/sab. [2]	0			
Rockfish	0			
Pacific cod	10,000			
Plck/Atka/othr [3]	30,000			
Total	200,000			
C. bairdi Tanner crab, number of animals:				
Yellowfin sole	100,000	1,225,000		
Rcksol/othr flat	700,000	300,000		
Turb/arrow/sabl	0	0		
Rockfish	0	50,000		
Pacific cod	75,000	712,500		
Plck/Atka/othr	125,000	712,500		
Total	1,000,000	3,000,000		
			Primary halibut	Secondary halibut
Pacific halibut, metric tons:				
Yellowfin sole			743	649
Rcksol/othr flat			660	755
Turb/arrow/sabl			0	0
Rockfish			175	200
Pacific cod			1,343	1,537
Plck/Atka/othr			1,479	1,692
Total			4,400	5,033
Pacific herring, metric tons:				
Midwater pollock				1,668
Yellowfin sole				391
Rcksol/othr flat				0
Turb/arrow/sabl				0
Rockfish				10
Pacific cod				29
Plck/Atka/othr [4]				210
Total				2,308

[1] Rock sole and other flatfish fishery category.
[2] Greenland turbot, arrowtooth flounder, and sablefish fishery category.
[3] Pollock, Atka mackerel, and "other species" fishery category.
[4] Pollock other than midwater pollock, Atka mackerel, and "other species" fishery category.

TABLE 2.—SEASONAL APPORTIONMENT OF THE 1992 HALIBUT BYCATCH ALLOWANCES

Fishery	Seasonal bycatch allowance (mt halibut)
Yellowfin sole:	
May 01–Aug. 02	424
Aug. 03–Dec. 31	425
Total	849
Rock sole/"other flatfish":	
Jan. 01–Mar. 29	566
Mar. 30–Jun. 28	95
Jun. 29–Sep. 27	94
Sep. 28–Dec. 31	remainder
Total	755
Turbot/arrowtooth flounder/ sablefish:	
Jan. 01–Dec. 31	0
Rockfish:	
Jan. 01–Mar. 29	20
Mar. 30–Jun. 28	60
Jun. 29–Sep 27	120
Sep. 28–Dec. 31	remainder
Total	200
Pacific cod:	
Jan. 01–Jun. 28	1,301
Jun. 29–Sep. 27	236
Sep. 28–Dec. 31	remainder
Total	1,537
Pollock/Atka mackerel/ "other species":	
Jan. 01–Apr. 15	1,221
Apr. 16–May 31	0
Jun. 01–Dec. 31	471
Total	1,692
Total 1992 Halibut bycatch limit.	5,033

For the reasons set out in the preamble, 50 CFR parts 672 and 675 are amended as follows:

PART 672—GROUNDFISH OF THE GULF OF ALASKA

1. The authority citation for 50 CFR part 672 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 672.7, paragraphs (g), (h), and (i) are redesignated as paragraphs (h), (i), and (j), and a new paragraph (g) is added to read as follows:

§ 672.7 Prohibitions.

* * * * *

(g) Fish for groundfish in an area with a vessel using a specified gear type when directed fishing for all groundfish by vessels using that gear type is closed

under §§ 672.20(c)(2) or 672.20(f)(1) of this part, except that fishing for Pacific halibut by vessels using hook-and-line gear will be permitted during seasons governed by 50 CFR part 301. This means that when fishing for groundfish by vessels using a specified gear type is prohibited in an area, that gear type shall not be deployed in that area.

* * * * *

3. In § 672.20, paragraphs (g)(2) and (g)(3) are redesignated as paragraphs (g)(4) and (g)(5) respectively, newly redesignated paragraphs (g)(5) and existing paragraphs (f)(1)(i), (f)(1)(iii) through (v), the first sentence of (f)(2)(ii), the introductory text of (f)(2)(iii), the first sentence of the introductory text of (f)(2)(v), and (h)(2) are revised, and new paragraphs (g)(2) and (g)(3) are added to read as follows:

§ 672.20 General limitations.

* * * * *

(f) * * *

(1) * * *

(i) *Trawl gear.* If, during the fishing year, the Regional Director determines that the catch of halibut by operators of vessels using trawl gear to participate in a directed fishery for groundfish will reach the halibut PSC limit, or seasonal apportionment thereof, provided for under paragraph (f)(2) of this section, NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by vessels using trawl gear, except for pollock by vessels using pelagic trawl gear, for the remainder of the season to which the halibut PSC limit or seasonal apportionment applies.

* * * * *

(iii) *Pot gear.* If, during the fishing year, the Regional Director determines that the catch of halibut by operators of vessels using pot gear to participate in a directed fishery for groundfish will reach the halibut PSC limit, or seasonal apportionment thereof, provided for under paragraph (f)(2) of this section, NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by vessels using pot gear for the remainder of the season to which the halibut PSC limit or seasonal apportionment applies.

(iv) Unused seasonal apportionments of halibut PSC limits specified for trawl, hook-and-line, or pot gear will be added to the respective seasonal apportionment for the next season during a current fishing year.

(v) If a seasonal apportionment of a halibut PSC limit specified for trawl, hook-and-line, or pot gear is exceeded, the amount by which the seasonal apportionment is exceeded will be deducted from the respective apportionment for the next season during a current fishing year.

(2) * * *

(ii) *Notices of final halibut PSC limits.* The Secretary will consider comments received on proposed halibut PSC limits and, after consultation with the Council, will publish a notice in the **Federal Register** specifying the final halibut PSC limits and seasonal apportionments thereof. * * *

(iii) The Secretary will base any seasonal apportionment of the halibut PSC limits on the following types of information: * * *

* * * * *

(v) When the vessels to which a halibut PSC limit applies have caught an amount of halibut equal to that PSC, the Regional Director may, by notice in the **Federal Register**, allow some or all of those vessels to continue to fish for groundfish using non-pelagic trawl gear under specified conditions, subject to the other provisions of this part. * * *

* * * * *

(g) * * *

(2) *Rockfish of the genera Sebastes and Sebastolobus, except demersal shelf rockfish.* The operator of a vessel is engaged in directed fishing for rockfish if he retains at any particular time during a trip an aggregate amount of rockfish species for which a directed fishery closure applies except for demersal shelf rockfish, that is equal to or greater than the sum of 15 percent of the aggregate amount of deep-water flatfish, flathead sole, sablefish, and other rockfish species for which directed fisheries are open, retained at the same time on the vessel during the same trip, and 5 percent of the total amount of other fish species retained at the same time on the vessel during the same trip.

(3) *Using pelagic trawl gear for groundfish species closed to directed fishing.* The operator of a vessel is engaged in directed fishing for groundfish species or species groups for which directed fishing is closed under paragraphs (c)(2) or (f)(1) of this section, if he retains at any time during a trip an aggregate amount of these groundfish species or species groups caught using pelagic trawl gear equal to or greater than 7 percent of the amount of other fish or fish products, in round weight equivalents, retained at the same time on the vessel during the same trip.

* * * * *

(5) *Other.* Except as provided under paragraphs (g)(1) through (g)(4) of this section, the operator of a vessel is engaged in directed fishing for a specific species or species group if he retains at any particular time during a trip that species or species group in an amount equal to or greater than 20 percent of the amount of all other fish species retained at the same time on the vessel during the same trip.

(h) * * *

(2) *Trip.* For purposes of this section, the operator of a vessel is engaged in a single fishing trip in an area from the commencement of, or continuation of, fishing after the effective date of a notice prohibiting directed fishing in the area under paragraphs (c)(2) or (f)(1) of this section until:

(i) The end of a weekly reporting period;

(ii) The vessel enters or leaves an area to which a directed fishing prohibition applies; or

(iii) Until any offload or transfer of any fish or fish product from that vessel, whichever occurs first.

* * * * *

4. In § 672.22, paragraphs (b) and (c) are redesignated as paragraphs (c) and (d), respectively, paragraph (a) is revised, and a new paragraph (b) is added, to read as follows:

§ 672.22 Inseason adjustments.

(a) *General.*

(1) Inseason adjustments issued by the Secretary under this paragraph include:

(i) The closure, extension, or opening of a season in all or part of a management area;

(ii) Modification of the allowable gear to be used in all or part of a management area;

(iii) The adjustment of TAC and PSC limits; and

(iv) Interim closures of statistical areas, or portions thereof, to directed fishing for specified groundfish species.

(2) Any inseason adjustment taken under paragraphs (a)(1)(i), (ii), or (iii) of this section must be based on a determination that such adjustments are necessary to prevent:

(i) The overfishing of any species or stock of fish or shellfish; or

(ii) The harvest of a TAC for any groundfish species or the taking of a PSC limit for any prohibited species that, on the basis of the best available scientific information, is found by the Secretary to be incorrectly specified; or

(iii) The underharvest of a TAC or gear share of a TAC for any groundfish species when catch information indicates that the TAC or gear share has not been reached.

(3) Any inseason closure of a statistical area, or portion thereof, under paragraph (a)(1)(iv) of this section, must be based upon a determination that such closures are necessary to prevent:

(i) A continuation of relatively high bycatch rates of prohibited species specified under § 672.20(e) of this part in a statistical area, or portion thereof;

(ii) The take of an excessive share of PSC limits or bycatch allowances established under § 672.20(f)(2) of this part by vessels fishing in a statistical area, or portion thereof;

(iii) The closure of one or more directed fisheries for groundfish due to excessive prohibited species bycatch rates occurring in a specified fishery operating within all or part of a statistical area; or

(iv) The premature attainment of established PSC limits or bycatch allowances and associated loss of opportunity to harvest the groundfish OY.

(4) The selection of the appropriate inseason management adjustments under paragraphs (a)(1)(i) and (a)(1)(ii) of this section must be from the following authorized management measures and must be based upon a determination by the Regional Director that the management adjustment selected is the least restrictive necessary to achieve the purpose of the adjustment:

(i) Any gear modification that would protect the species in need of conservation, but which would still allow other fisheries to continue; or

(ii) An inseason adjustment which would allow other fisheries to continue in noncritical areas and time periods; or

(iii) Closure of a management area and season to all groundfish fishing; or

(iv) Reopening of a management area or season to achieve the TAC or gear share of a TAC for any of the target species or the "other species" category.

(5) The adjustment of a TAC or PSC limit for any species under paragraph (a)(1)(iii) of this section must be based upon a determination by the Regional Director that the adjustment is based upon the best available scientific information concerning the biological stock status of the species in question and that the currently specified TAC or PSC limit is incorrect. Any adjustment to a TAC or PSC limit must be reasonably related to the change in biological stock status.

(6) The inseason closure of a statistical area, or a portion thereof, under paragraph (a)(1)(iv) of this section shall not extend beyond a 60-day period unless information considered under paragraph (b) of this section warrants an extended closure period. Any closure of a statistical area, or portion thereof, to reduce prohibited species bycatch rates requires a determination by the Regional Director that the closure is based on the best available scientific information concerning the seasonal distribution and abundance of prohibited species and bycatch rates of prohibited species associated with various groundfish fisheries.

(b) *Data.* All information relevant to one or more of the following factors may be considered in making the determinations required under paragraphs (a) (2) and (3) of this section:

(1) The effect of overall fishing effort within a statistical area;

(2) Catch per unit of effort and rate of harvest;

(3) Relative distribution and abundance of stocks of groundfish species and prohibited species within all or part of a statistical area;

(4) The condition of a stock in all or part of a statistical area;

(5) Inseason prohibited species bycatch rates observed in groundfish fisheries in all or part of a statistical area;

(6) Historical prohibited species bycatch rates observed in groundfish fisheries in all or part of a statistical area;

(7) Economic impacts on fishing businesses affected; or

(8) Any other factor relevant to the conservation and management of groundfish species or any incidentally caught species that are designated as prohibited species or for which a PSC limit has been specified.

* * * * *

5. In § 672.23, paragraph (a) is revised, and new paragraphs (d) and (e) are added to read as follows:

§ 672.23 Seasons.

(a) Fishing for groundfish in the regulatory areas and districts of the Gulf of Alaska is authorized from 00:01 a.m., Alaska local time (A.l.t.), January 1, through 12 midnight, A.l.t., December 31, subject to the other provisions of this part, except as provided in paragraphs (c) through (e) of this section.

* * * * *

(d) Directed fishing for rockfish of the genera *Sebastes* and *Sebastolobus* with trawl gear is authorized from 12 noon, A.l.t., on the first day of the third quarterly reporting period of a fishing year, through 12 midnight, A.l.t., December 31, subject to other provisions of this part.

(e) Notwithstanding other provisions of this part, fishing for groundfish with trawl gear in the Gulf of Alaska is prohibited from 00:01 a.m., A.l.t. on January 1, through 12 noon, A.l.t., January 20.

6. In § 672.26, paragraphs (a)(2)(ii) and (b) are revised as follows:

§ 672.26 Program to reduce prohibited species bycatch rates.

(a) * * *

(2) * * *

(ii) *Bycatch rate* refers to the ratio of the total round weight of halibut, in kilograms, to the total round weight, in metric tons, of groundfish for which a TAC has been specified under § 672.20 of this part while participating in the midwater pollock or "other trawl" fisheries as defined in paragraph (b) of this section.

* * * * *

(b) *Fisheries.* A vessel will be subject to this section if the groundfish catch of the vessel is observed on board the vessel, or on board a mothership processor that receives unsorted codends from the vessel, at any time during a weekly reporting period, and the vessel is assigned under paragraph (d)(3)(i)(A) of this section to either the midwater pollock fishery or the "other trawl" fishery as defined in paragraphs (b) (1) and (2) of this section. During any weekly reporting period, a vessel's observed catch composition of groundfish species for which a TAC has been specified under § 672.20 of this part will determine the fishery to which the vessel is assigned, as follows:

(1) The *midwater pollock fishery* means fishing with trawl gear that results in an observed groundfish catch during any weekly reporting period that is composed of 95 percent or more of pollock when the directed fishery for pollock by vessels using trawl gear other than pelagic trawl gear is closed.

(2) The *other trawl* fishery means fishing with trawl gear that results in an observed groundfish catch during any weekly reporting period that does not qualify as a midwater pollock fishery under paragraph (b)(1) of this section.

* * * * *

PART 675—GROUNDFISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA

7. The authority citation for part 675 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

8. In § 675.7, paragraphs (h), (i), and (j) are redesignated as paragraphs (i), (j), and (k) and a new paragraph (h) is added to read as follows:

§ 675.7 Prohibitions.

* * * * *

(h) Fish for groundfish in an area with a vessel using a specified gear type when directed fishing for all groundfish by vessels using that gear type is closed under §§ 675.20(a)(8) or 675.21 (c) or (d)

of this part, except that fishing for Pacific halibut by vessels using hook-and-line gear will be permitted during seasons governed by 50 CFR part 301. This means that when fishing for groundfish by vessels using a specified gear type is prohibited in an area, that gear type shall not be deployed in that area.

* * * * *

9. In § 675.20, paragraphs (h)(1) and (i)(2) are revised as follows:

§ 675.20 General limitations.

* * * * *

(h) * * *

(1) *Using pelagic trawl gear for groundfish species closed to directed fishing.* The operator of a vessel is engaged in directed fishing for groundfish species or species groups for which directed fishing is closed under paragraph (a)(8) of this section or § 675.21(c) of this part, if he retains at any time during a trip an aggregate amount of these groundfish species or species groups caught with pelagic trawl gear equal to or greater than 7 percent of the amount of other fish or fish products, in round weight equivalents, retained on the vessel at the same time during the same trip.

* * * * *

(i) * * *

(2) *Trip.* For purposes of this section, the operator of a vessel is engaged in a single fishing trip in an area from the commencement of, or continuation of, fishing after the effective date of a notice prohibiting directed fishing in the area under paragraph (a)(8) of this section or § 675.21 (c) or (d) of this part until:

(i) The end of a weekly reporting period;

(ii) The vessel enters or leaves an area to which a directed fishing prohibition applies; or

(iii) Until any offload or transfer of any fish or fish product from that vessel, whichever occurs first.

* * * * *

10. In § 675.21, paragraph (a)(5) is suspended through December 31, 1992; paragraph (b) heading and paragraphs (b)(1), (b)(2), (b)(4), (c) and (d) are revised; paragraphs (e) and (f) are removed; and new paragraphs (a)(7) and (a)(8), are added to read as follows:

§ 675.21 Prohibited species catch (PSC) limitations.

(a) * * *

(8) *Applicable through December 31, 1992.* The secondary PSC limit of Pacific halibut caught while conducting any trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area during 1992 is an amount of Pacific halibut equivalent to 5,033 mt.

(9) *Applicable through December 31, 1992.* The PSC limit of Pacific halibut caught while conducting any non-trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area during 1992 is an amount of Pacific halibut equivalent to 750 mt of halibut mortality.

(b) *Apportionment of PSC limits established for trawl gear fisheries.* (1) *Apportionment to trawl fishery categories.* The Secretary, after consultation with the Council, will apportion each PSC limit into bycatch allowances that will be assigned to fishery categories specified in paragraph (b)(4) of this section, based on each category's proportional share of the anticipated incidental catch during a fishing year of prohibited species for which a PSC limit is specified and the need to optimize the amount of total groundfish harvested under established PSC limits. The sum of all bycatch allowances of any prohibited species will equal its PSC limit.

(i) For purposes of this section, the trawl PSC limits for red king crab, *C. bairdi* Tanner crab, and Pacific halibut will be apportioned to the fishery categories listed at paragraphs (b)(4) (ii) through (vi) of this section. Any amount of red king crab, *C. bairdi* Tanner crab, or Pacific halibut that is incidentally taken in the midwater pollock fishery, as defined at paragraph (b)(4)(i) of this section, will be counted against the bycatch allowances specified for the pollock/Atka mackerel/"other species" category defined at paragraph (b)(4)(vi) of this section.

(ii) For purposes of this section, the PSC limit for Pacific herring will be apportioned to the fishery categories listed at paragraphs (b)(4) (i) through (vi) of this section.

(2) *Seasonal apportionments of bycatch allowances.*

(i) The Secretary, after consultation with the Council, may apportion fishery bycatch allowances on a seasonal basis. The Secretary will base any seasonal apportionment of a bycatch allowance on the following types of information:

(A) Seasonal distribution of prohibited species;

(B) Seasonal distribution of target groundfish species relative to prohibited species distribution;

(C) Expected prohibited species bycatch needs on a seasonal basis relevant to change in prohibited species biomass and expected catches of target groundfish species;

(D) Expected variations in bycatch rates throughout the fishing year;

(E) Expected changes in directed groundfish fishing seasons;

(F) Expected start of fishing effort; or

(G) Economic effects of establishing seasonal prohibited species apportionments on segments of the target groundfish industry.

(ii) Unused seasonal apportionments of fishery bycatch allowances made under paragraph (b)(2)(i) of this section will be added to its respective fishery bycatch allowance for the next season during a current fishing year.

(iii) If a seasonal apportionment of a fishery bycatch allowance made under paragraph (b)(2)(i) of this section is exceeded, the amount by which the seasonal apportionment is exceeded will be deducted from its respective apportionment for the next season during a current fishing year.

* * * * *

(4) For purposes of apportioning trawl PSC limits among fisheries, the following fishery categories are specified and defined in terms of round weight equivalents of those groundfish species or species groups for which a TAC has been specified under § 675.20.

(i) *Midwater pollock fishery.* Fishing with trawl gear during any weekly reporting period that results in a catch of pollock that is 95 percent or more of the total amount of groundfish caught during the week.

(ii) *Flatfish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of rock sole, "other flatfish," and yellowfin sole that is greater than the retained amount of any other fishery category defined under paragraph (b)(4) of this section.

(A) *Yellowfin sole fishery.* Fishing with trawl gear during any weekly reporting period that is defined as a flatfish fishery under paragraph (b)(4)(ii) of this section and results in a retained amount of yellowfin sole that is 70 percent or more of the retained aggregate amount of rock sole, "other flatfish," and yellowfin sole.

(B) *Rock sole/"other flatfish" fishery.* Fishing with trawl gear during any weekly reporting period that is defined as a flatfish fishery under paragraph (b)(4)(ii) of this section and is not a yellowfin sole fishery as defined under paragraph (b)(4)(ii)(A) of this section.

(iii) *Greenland turbot/arrowtooth flounder/sablefish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of Greenland turbot, arrowtooth flounder, and sablefish that is greater than the retained amount of any other fishery category defined under paragraph (b)(4) of this section.

(iv) *Rockfish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of rockfish species of the genera *Sebastes* and *Sebastolobus* that is greater than the retained amount of any other fishery category defined under paragraph (b)(4) of this section.

(v) *Pacific cod fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of Pacific cod that is greater than the retained amount of any other groundfish category defined under paragraph (b)(4) of this section.

(vi) *Pollock/Atka mackerel/"other species."* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of pollock other than pollock harvested in the midwater pollock fishery defined at paragraph (b)(4)(i) of this section, Atka mackerel, and "other species" that is greater than the retained amount of any other fishery category defined under paragraph (b)(4) of this section.

(c) *Attainment of a trawl fishery bycatch allowance.*

(1) *Attainment of a trawl bycatch allowance for red king crab, C. bairdi Tanner crab, or Pacific halibut.*

(i) *Zone 1 red king crab or C. bairdi Tanner crab bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(4) (ii) through (vi) of this section will catch the Zone 1 bycatch allowance, or seasonal apportionment thereof, of red king crab or *C. bairdi* Tanner crab specified for that fishery category under paragraphs (b) (1) through (3) of this section, NMFS will publish a notice in the **Federal Register** closing Zone 1 to directed fishing for aggregate species within that fishery category for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/"other species" fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(ii) *Zone 2 red king crab or C. bairdi crab bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(4) (ii) through (vi) of this section will catch the Zone 2 bycatch allowance, or seasonal apportionment thereof, of red king crab or *C. bairdi* crab specified for that fishery category under paragraphs (b) (1) through (3) of this section, NMFS will publish a notice in the **Federal Register** closing Zone 2 to directed fishing for aggregate species within that fishery category for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/"other species" fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(iii) *Primary halibut bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(4) (ii) through (vi) of this section in the Bering Sea and Aleutian Islands Management Area will catch the primary halibut bycatch allowance, or seasonal apportionment thereof, specified for that fishery category under paragraphs (b) (1) through (3) of this section, NMFS will publish a notice in the **Federal Register** closing Zones 1 and 2H to directed fishing for aggregate species within that fishery category for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/"other species" fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(iv) *Secondary halibut bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the trawl fishery categories listed in paragraphs (b)(4) (ii) through (vi) of this section in the Bering Sea and Aleutian Islands Management Area will catch the secondary halibut bycatch allowance, or seasonal apportionment thereof, specified for that fishery category under paragraphs (b) (1) through (3) of this section, NMFS will publish a notice in the **Federal Register** closing the entire Bering Sea and Aleutian Islands Management Area to directed fishing for aggregate species within that fishery category for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for pollock/Atka mackerel/"other species" fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(2) *Attainment of a trawl bycatch allowance for Pacific herring.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(4) (i) through (vi) of this section in the Bering Sea and Aleutian Islands Management Area will catch the herring bycatch allowance, or seasonal apportionment thereof, specified for that fishery category under paragraphs (b) (1) through (3) of this section, NMFS will publish a notice in the **Federal Register** closing the Herring Savings Areas to directed fishing for aggregate species within that fishery category, except that:

(i) When the midwater pollock fishery category reaches its specified bycatch allowance, or seasonal apportionment thereof, the Herring Savings Areas are closed to directed fishing for pollock with trawl gear; and

(ii) When the pollock/Atka mackerel/"other species" fishery category reaches its specified bycatch allowance, or seasonal apportionment thereof, only the Herring Savings Areas are closed for directed fishing for pollock to trawl vessels using nonpelagic trawl gear.

(d) *Applicable through December 31, 1992. Attainment of the halibut PSC limited established for non-trawl gear.* If, during the 1992 fishing year, the Regional Director determines that U.S. fishing vessels participating in any non-trawl gear fishery will catch the Pacific halibut PSC limit established for non-trawl gear at paragraph (a)(9) of this section, NMFS will publish a notice in the **Federal Register** closing the entire Bering Sea and Aleutian Islands Management Area to directed fishing for groundfish by vessels using non-trawl gear for the remainder of the year.

11. In § 675.23, paragraph (a) is revised, and new paragraph (d) is added as follows:

§ 675.23 Seasons.

(a) Fishing for groundfish in the subareas and statistical areas of the Bering Sea and Aleutian Islands is authorized from 00:01 a.m., Alaska local time (A.l.t.), on January 1, through 12 midnight, A.l.t., December 31, subject to the other provisions of this part, except as provided in paragraphs (c) through (d) of this section.

* * * * *

(d) Notwithstanding other provisions of this part, fishing for groundfish with trawl gear in the Bering Sea and Aleutian Islands is prohibited from 00:01 a.m., A.l.t. on January 1, through 12 noon, A.l.t., January 20.

12. In § 675.26, paragraphs (a)(2)(ii)(A), (a)(2)(ii)(B), (b), (d)(3)(i)(A), (d)(3)(i)(B), and (d)(3)(i)(C) are revised to read as follows:

§ 675.26 Program to reduce prohibited species bycatch rates.

(a) * * *

(2) * * *

(ii) * * *

(A) The ratio of total round weight of halibut, in kilograms, to the total round weight, in metric tons (mt), of groundfish for which a TAC has been specified under § 675.20 of this part while participating in any of the trawl fisheries defined under § 675.26(b) of this section;

(B) The ratio of number of red king crab to the total round weight, in mt, of groundfish for which a TAC has been specified under § 675.20 of this part while participating in the yellowfin sole and "other trawl" fisheries, as defined under § 675.26(b) of this section.

* * * * *

(b) *Fisheries.* A vessel will be subject to this section if the groundfish catch of the vessel is observed on board the vessel, or on board a mothership processor that receives unsorted codends from the vessel, at any time during a weekly reporting period, and the vessel is assigned under paragraph (d)(3)(i)(A) of this section to the midwater pollock fishery, the yellowfin sole fishery, the "bottom pollock" fishery or the "other trawl" fishery as defined in paragraphs (b) (1) through (4) of this section. During any weekly reporting period, a vessel's observed catch composition of groundfish species or species groups for which a TAC has been specified under § 675.20 of this part, in round weight equivalents, will determine the fishery to which the vessel is assigned, as follows:

(1) *Midwater pollock fishery.* Fishing with trawl gear that results in an observed groundfish catch during any weekly reporting period that is composed of 95 percent or more of pollock when the directed fishery for pollock by vessels using trawl gear other than pelagic trawl gear is closed.

(2) *Yellowfin sole fishery.* Fishing with trawl gear that results in a retained aggregate amount of rock sole, "other flatfish," and yellowfin sole during any weekly reporting period that is greater than the retained amount of any other fishery defined under paragraph (b) of this section and results in a retained amount of yellowfin sole that is 70 percent or more of the retained aggregate amount of rock sole, "other flatfish," and yellowfin sole.

(3) *"Bottom pollock" fishery.* Fishing with trawl gear that results in a retained amount of pollock during any weekly reporting period other than pollock harvested in the midwater pollock fishery defined at paragraph (b)(1) of this section, that is greater than the retained amount of any other fishery defined under paragraph (b) of this section.

(4) *"Other trawl" fishery.* Fishery with trawl gear that results in a retained amount of groundfish during any weekly reporting period that does not qualify as a midwater pollock, yellowfin sole, or "bottom pollock" fishery under paragraphs (b) (1) through (3) of this section.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(A) *Assignment of vessels to fisheries.* (*1*) Catcher processor vessels will be assigned to fisheries at the end of each weekly reporting period based on the round weight equivalent of the retained groundfish catch composition reporting on a vessel's weekly production report that is submitted to the Regional Director under § 675.5(c)(2) of this part.

(*2*) Catcher vessels that deliver to mothership processors in Federal waters during a weekly reporting period will be assigned to fisheries based on the round weight equivalent of the retained groundfish catch composition reported on the weekly production report submitted to the Regional Director for that week by the mothership under § 672.5(c)(2) of this part.

(*3*) Catcher vessels delivering groundfish to shoreside processors or to mothership processors in Alaska State waters during a weekly reporting period will be assigned to fisheries based on the round weight equivalent of the groundfish retained by the processor and reported on an Alaska Department of Fish and Game fish ticket as required under Alaska State regulations at A.S. 16.05.690.

(B) At the end of each fishing month during which an observer sampled at least 50 percent of a vessel's total number of trawl hauls retrieved while an observer was on board (as recorded in the vessel's daily logbook required under § 675.5 of this part), the Regional Director will calculate the vessel's bycatch rate based on observer data for each fishery specified in paragraph (b) of this section to which the vessel was assigned for any weekly reporting period during that fishing month. Only observed data that have been checked, verified, and analyzed by NMFS will be used to calculate vessel bycatch rates for purposes of this section.

(C) The bycatch rate of a vessel for a fishery described under paragraph (b) of this section during a fishing month is a ratio of halibut to groundfish that is calculated by using the total round weight of halibut (in kilograms), or total number of red king crab or chinook salmon, in samples during all weekly reporting periods in which the vessel was assigned to that fishery and the total round weight of the groundfish (in metric tons) for which a TAC has been specified under § 675.20 in samples taken during all such periods.

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[FR Doc. 92-22800 Filed 9-22-92; 8:45 am]

BILLING CODE 3510-22-M